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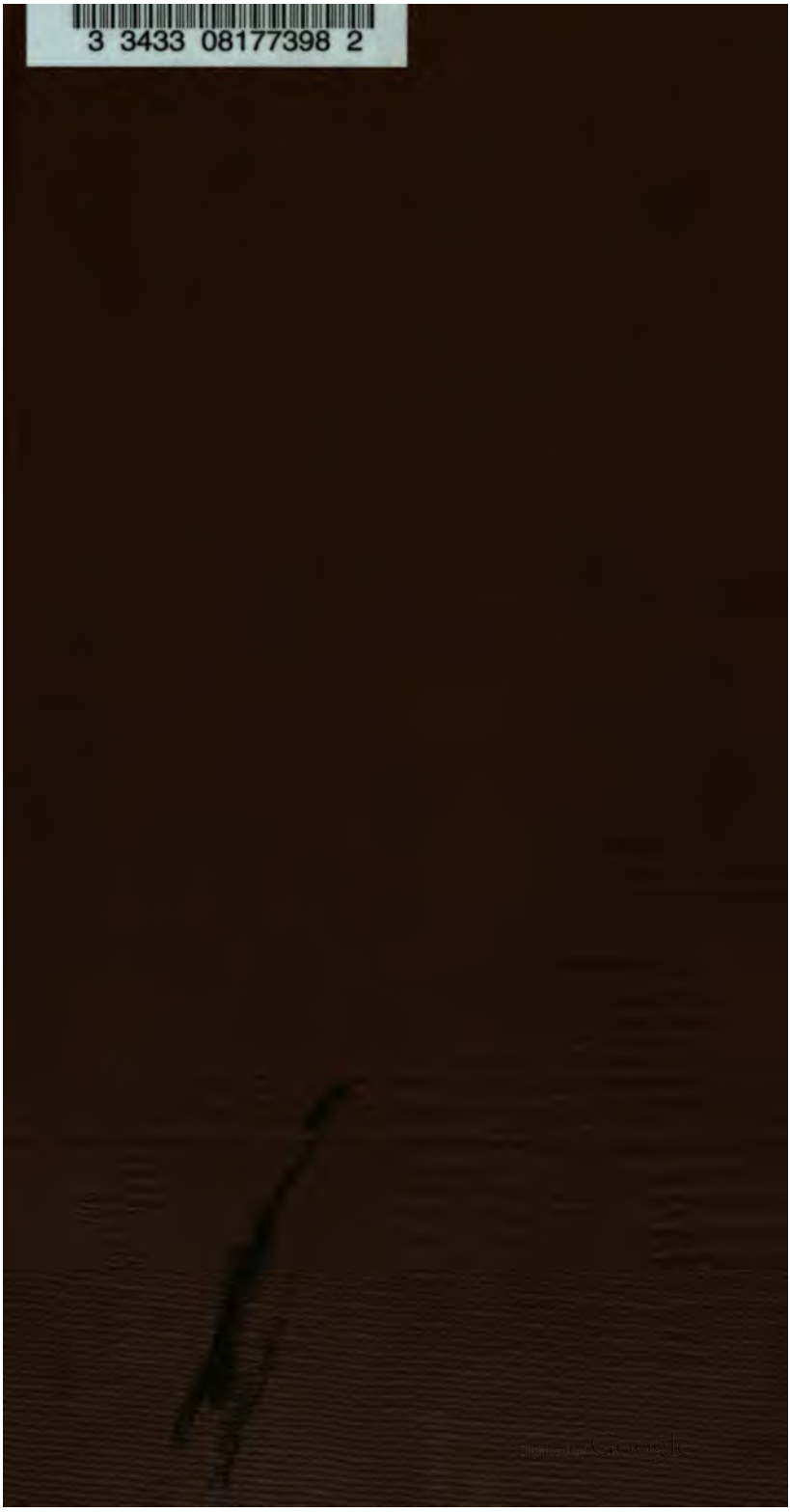

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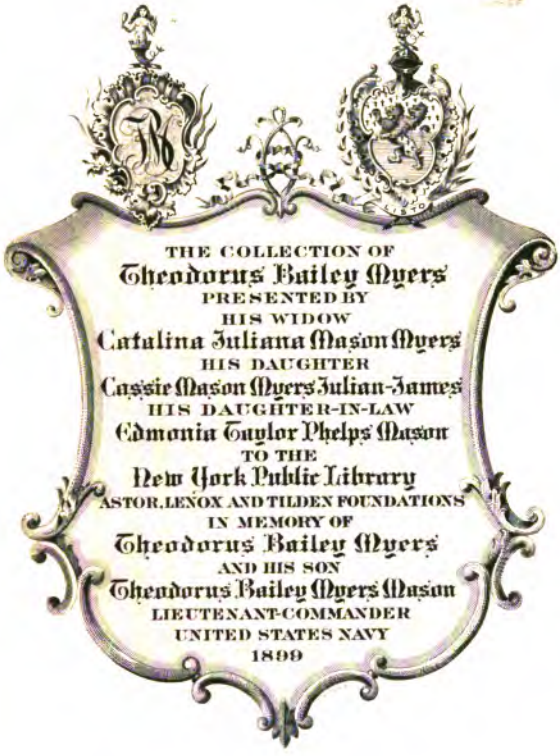

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THE

TRIALS

OF

WILLIAM S. SMITH,

AND

SAMUEL G. OGDEN,

FOR

MISDEMEANOURS,

HAD IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NEW-YORK DISTRICT, IN JULY, 1806.

WITH A PRELIMINARY ACCOUNT OF THE PROCEEDINGS OF THE SAME COURT AGAINST MESSRS. SMITH & OGDEN, IN THE PRECEDING APRIL TERM

BY

THOMAS LLOYD, STENOGRAPHER.

NEW-YORK:

PRINTED BY AND FOR I. RILEY AND CO.

1807.

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District of New York, } ss. BE IT REMEMBERED, That on the fifth day of January, in the thirty-first year of the Independence of the United States of America, ISAAC RILEY, of the said district, hath deposited in this office, the Title of a Book, the right whereof he claims as proprietor, in the words and figures following, to wit:

"The Trials of William S. Smith and Samuel G. Ogden, for Misdemeanours, had in the Circuit Court of the United States, for the "New York district, in July, 1806. With a Preliminary Account "of the proceedings of the same court against Messrs. Smith "and Ogden in the preceding April term. By Thomas Lloyd, Stenographer."

In CONFORMITY to the Act of the Congress of the United States, entitled, "An Act for the encouragement of Learning, by securing the "Copies of Maps, Charts, and Books, to the Authors and Proprietors "of such Copies, during the times therein mentioned;" and also to an Act, entitled, "An Act supplementary to an Act, entitled, An Act for "the encouragement of Learning, by securing the copies of Maps, "Charts, and Books, to the Authors and Proprietors of such Copies, "during the times therein mentioned, and extending the benefits there-"of, to the Arts of Designing, Engraving, and etching historical and "other prints."

EDWARD DUNSCOMB,
Clerk of the District of New York.

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PRELIMINARY MATTER.

At a stated circuit court of the United States, held for the district of New-York, at the city of New-York, in the second circuit, on Tuesday, the 1st day of April, 1806, at 11 o'clock, A. M.

Present,

The Hon. MATTHIAS B. TALMADGE, Esq. Judge of the district of New-York.

The United States of America versus *Samuel G. Ogden, defendant.* } Samuel Murgatroyd and Samuel Gouverneur, the sureties for the defendant to appear and answer, having come into court, and by their counsel prayed leave to surrender the defendant, in discharge of their recognizance, and that they be discharged from their recognizance, which being ordered by the court—thereupon, on motion of the attorney of the district, on behalf of the United States, that the said defendant stand committed to the custody of the marshal of this district, which being opposed by Mr. Colden, Mr. Hoffman, and Mr. Emmet, of counsel for the defendant,

It is thereupon ordered by the court, that the said defendant find sureties to abide the further order of this court, or that he stand committed to the custody of the marshal of the district.

And thereupon Mr. Colden, one of the counsel for the defendant, presented, and prayed the allowance of a habeas corpus *ad sub.* which being allowed by his honour the judge *instanter*, was returned by the marshal of the district with the indorsement, following, to wit:

"I do hereby certify, that Samuel G. Ogden was committed to my custody the first day of April, 1806, by virtue of the annexed committitur, which is the only cause of his capture or detention."

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(Committitur annexed is as follows.)

At a stated circuit court of the United States, held for the district of New-York, at the city of New-York, in the second circuit, on Tuesday the 1st day of April, 1806, at 11 o'clock, A. M.

Present,

The Hon. MATTHIAS B. TALMADGE, Esq. Judge of the district of New York.

The United States of America versus *Samuel G. Ogden, defendant.* } Samuel Murgatroyd and Samuel Gouverneur, the sureties for the defendant to appear and answer, having come into court, and by their counsel prayed leave to surrender the defendant in discharge of their recognizance, and that they be discharged from their recognizance, which being ordered by the court; thereupon, on motion of the attorney of the district, on behalf of the United States, that the said defendant stand committed to the custody of the marshal of this district, which being opposed by Mr. Colden, Mr. Hoffman, and Mr. Emmet, of counsel for the defendant,

It is thereupon ordered by the court, that the said defendant find sureties to abide the further order of this court, or that he stand committed to the custody of the marshal of the district.

(Copy.)
EDWARD DUNSCOMB, Clerk.

Mr. Hoffman, of counsel for the defendant, then moved the court, that the defendant be discharged from the custody of the marshal, which being opposed by the attorney of the district, and the same having been argued by Mr. Hoffman, Mr. Colden, and Mr. Emmet, of counsel for the defendant, and by the attorney of the district on behalf of the United States; thereupon

It is ordered by the court, that the defendant stand committed.

Whereupon the counsel for the defendant offered surety for the defendant to appear and answer; and thereupon the said Samuel G. Ogden, and Samuel Gouverneur, of the city of New York, merchant, severally entered into a recognizance; the said Samuel G. Ogden, in the sum of ten thousand dollars, and the said Samuel Gouverneur in the sum of twenty thousand dollars, for the appearance of the said Samuel G. Ogden.

Whereupon, on reading and filing the several depositions of the said Samuel G. Ogden, the defendant, and William S. Smith, it was moved by Mr. Colden, of counsel for the defendant, that certain examinations and depositions of the said Samuel G. Ogden and William S. Smith, taken before his honour the judge

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of the district, be suppressed, and not permitted to go to the grand jury, or otherwise used, on the ground of their having been improperly and illegally taken, which being opposed by the attorney of the district, on behalf of the United States, and the said motion being argued by Mr. Colden, of counsel for the defendant, and by the attorney of the district on behalf of the U. States, and it being assented to (by reason of the lateness of the hour) by the attorney of the district, and by the counsel for the defendant, that the further hearing of this motion be postponed until to-morrow morning—it was thereupon ordered by the court, that the said motion be put off for further argument, until to-morrow morning.

Wednesday, April 2, 1806.

Present,

The Hon. MATTHIAS B. TALMADGE, Esq. Judge of the district of New-York.

The United States of America versus *Samuel G. Ogden, defendant.* — On the motion (of yesterday) of Mr. Colden, of counsel for the defendant, to suppress the examinations and testimony of the said Samuel G. Ogden and William S. Smith, taken before the judge of the district, from going to the grand jury, or being otherwise used—the further hearing of this motion came on this day pursuant to the order of yesterday; and the same having been argued by Mr. Hoffman, Mr. Emmet, and Mr. Harison, of counsel for the defendant, and by the attorney of the district, on behalf of the United States; thereupon

The Court takes time to advise.

Thursday, April 3, 1806.

Present,

The Hon. MATTHIAS B. TALMADGE, Esq. Judge of the district of New-York.

The United States of America versus *Samuel G. Ogden, defendant.* — On the motion of Mr. Colden, of counsel for the defendant, to suppress the examinations and testimony of the said Samuel G. Ogden and William S. Smith, taken before the judge of the district, from going to the grand jury, or being otherwise used.

The defendant, Samuel G. Ogden, appearing on his recognizance, and the said William S. Smith appearing by his counsel, and they having severally made affidavits, which are filed, and on

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which they moved by their counsel, that certain examinations, taken by the honourable Matthias B. Talmadge, esq. judge of the district court of this district, and signed by the said defendant and by the said William S. Smith, before the said judge, and specified in said affidavits, be ordered to be suppressed, or that such order be made to prevent the said examinations and depositions, or either of them, from being used against the said William S. Smith, or either of them, as evidence before the grand jury, or otherwise, as to the court shall seem fit.

After hearing Mr. Colden, Mr. Hoffman, Mr. Emmet, and Mr. Harison, in behalf of the defendant, and the attorney of the district for the United States, and the court having taken time to advise as to its opinion on this motion,

Doth now order, that they take nothing by their said motion.

Monday, April 7th 1806.

Present, as before.

The grand jury came into court, and presented to the court an indictment against Samuel G. Ogden; and an indictment against William S. Smith, (which said indictments are as follows:)

Circuit Court of the United States of America, for the district of New-York, in the second circuit.

District of New-York, to wit: The grand jurors of the United States of America, in and for the body of the district of New-York, upon their oath, present, that Samuel G. Ogden, late of the first ward of the city of New-York, in the district of New-York, merchant, did, on the tenth day of January, in the year of our Lord one thousand eight hundred and six, within the jurisdiction of the said United States, to wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, begin a certain military expedition to be carried on from thence against the dominions of a foreign prince; to wit, the dominions of the king of Spain; the said United States then and there being at peace with the said king of Spain, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity; and the jurors aforesaid, upon their said oath, do farther present, that the said Samuel G. Ogden, afterwards, to wit, on the said tenth day of January, in the year of our Lord one thousand eight hundred and six, within the jurisdiction of the said United States, to wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, did set on foot a certain military enterprise, to be carried on from thence against the territory of a foreign prince;

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to wit, the territory of the king of Spain; the said king of Spain then and there being at peace with the said United States, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity; and the jurors aforesaid, upon their said oath, do farther present, that the said Samuel G. Ogden, afterwards to wit, on the said tenth day of January, in the year of our Lord, one thousand eight hundred and six, within the jurisdiction of the said United States, to wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, did, with force and arms, set on foot a certain other military enterprise, to be carried on from thence against the territory of a foreign prince; to wit, against the province of Caraccas, in South America, the said province of Caraccas then and there being the territory of the king of Spain, and the said king of Spain then and there being at peace with the said United States, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity; and the jurors aforesaid, upon their said oath, do farther present, that the said Samuel G. Ogden, afterwards to wit, on the said tenth day of January, in the year of our Lord one thousand eight hundred and six, within the jurisdiction of the said United States, to wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, did, with force and arms, provide the means, to wit, one ship or vessel, called the Leander, for a certain other military enterprise, to be carried on from thence against the dominions of a foreign prince, to wit, against the dominions of the king of Spain, in South America, the said king of Spain then and there being at peace with the said United States, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity; and the jurors aforesaid, upon their said oath, do farther present, that the said Samuel G. Ogden, afterwards to wit, on the said tenth day of January, in the year of our Lord one thousand eight hundred and six, within the jurisdiction of the said United States, to wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, did, with force and arms, prepare the means, to wit, one other ship or vessel, called the Leander, one hundred and fifty men, thirty cannon, five hundred muskets, four thousand pikes, thirty tons of cannon balls, one hundred swords, and one hundred and fifty quarter casks of gun-powder, for a certain other military expedition, to be carried on from thence against the province of Caraccas, in South America, the said province of Caraccas then and there being the territory of a foreign prince, to wit, the territory of the king of Spain, and the said king of Spain then and there being at peace with the said

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United States, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity; and the jurors aforesaid, upon their said oath, do further present, that the said Samuel G. Ogden, afterwards to wit, on the said tenth day of January, in the year of our Lord one thousand eight hundred and six, within the jurisdiction of the said United States, to wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, did, with force and arms, provide the means, to wit, one other ship or vessel called the Leander, one hundred and fifty men, whose names are to the jurors aforesaid yet unknown, thirty cannon, five hundred muskets, four thousand pikes, thirty tons of cannon balls, one hundred swords, and one hundred and fifty quarter casks of gun-powder for a certain other military expedition, to be carried on from thence against the dominions of some foreign state to the jurors aforesaid yet unknown, with whom the United States were then and there at peace, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity; and the jurors aforesaid, upon their said oath, do farther present, that the said Samuel G. Ogden, afterwards to wit, on the said tenth day of January, in the year of our Lord one thousand eight hundred and six, within the jurisdiction of the said United States, to wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, did, with force and arms, set on foot a certain other military enterprise, to be carried on from thence against the dominions of some foreign state, to the jurors aforesaid yet unknown, with whom the said United States were then and there at peace, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity.

NATHAN SANFORD, attorney of the United States for the district of New-York.

Endorsed.

Circuit court of the United States for the district of New-York, in the second circuit.

The United States of America versus *Samuel G. Ogden.*

Indictment.
Sanford, Attorney, U. S.
A true bill—Nicholas Fish.
Filed April 7, 1806.
DUNSCOMB, Clerk.

The defendant upon this indictment pleads Not Guilty.
April 10, 1806. DUNSCOMB, Clerk.

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Circuit Court of the United States of America, for the district of New-York, in the second circuit.

District of New-York, to wit: The grand jurors of the United States of America, in and for the body of the district of New-York, upon their oath, present, that William S. Smith, late of the first ward of the city of New-York, in the district of New-York, surveyor of the customs, did, on the 10th day of Jan. in the year of our Lord one thousand eight hundred and six, within the jurisdiction of the said United States, to wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, begin a certain military expedition to be carried on from thence against the dominions of a foreign prince; to wit, the dominions of the king of Spain; the said United States then and there being at peace with the said king of Spain, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity; and the jurors aforesaid, upon their said oath, do farther present, that the said William S. Smith, afterwards, to wit, on the said tenth day of January, in the year of our Lord one thousand eight hundred and six, within the jurisdiction of the said United States, to wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, did set on foot a certain military enterprise, to be carried on from thence against the territory of a foreign prince; to wit, the territory of the king of Spain; the said king of Spain then and there being at peace with the said United States, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity; and the jurors aforesaid, upon their said oath, do farther present, that the said William S. Smith, afterwards, to wit, on the said tenth day of January, in the year of our Lord, one thousand eight hundred and six, within the jurisdiction of the said United States, to wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, did, with force and arms, set on foot a certain other military enterprise, to be carried on from thence against the territory of a foreign prince; to wit, against the province of Caraccas, in South America, the said province of Caraccas then and there being the territory of the king of Spain, and the said king of Spain then and there being at peace with the said United States, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity; and the jurors aforesaid, upon their said oath, do farther present, that the said William S. Smith, afterwards to wit, on the said tenth day of January, in the year of our Lord one thousand eight hundred and six, within the jurisdiction of the said United States, to

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wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, did, with force and arms, provide the means, to wit, thirty men and three hundred dollars in money, for a certain other military enterprise, to be carried on from thence against the dominions of a foreign prince, to wit, against the dominions of the king of Spain, in South America, the said king of Spain then and there being at peace with the said United States, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity; and the jurors aforesaid, upon their said oath, do farther present, that the said William S. Smith, afterwards to wit, on the said tenth day of January, in the year of our Lord one thousand eight hundred and six, within the jurisdiction of the said United States, to wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, did, with force and arms, prepare the means, to wit, 30 men and 300 dollars in money, for a certain other military expedition, to be carried on from thence against the province of Caraccas, in South America, the said province of Caraccas then and there being the territory of a foreign prince, to wit, the territory of the king of Spain, and the said king of Spain then and there being at peace with the said United States, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity; and the jurors aforesaid, upon their said oath, do farther present, that the said William S. Smith, afterwards, to wit, on the said tenth day of January, in the year of our Lord one thousand eight hundred and six, within the jurisdiction of the said United States, to wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, did, with force and arms, provide the means, to wit, thirty men, whose names are to the jurors aforesaid yet unknown; and 300 dollars in money, for a certain other military expedition, to be carried on from thence against the dominions of some foreign state to the jurors aforesaid yet unknown, with whom the said U. States were then and there at peace, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity; and the jurors aforesaid, upon their said oath, do farther present, that the said William S. Smith, afterwards, to wit, on the said tenth day of January, in the year of our Lord one thousand eight hundred and six, within the jurisdiction of the said United States, to wit, at the city of New-York, in the district of New-York, and at the first ward of the said city, did, with force and arms, set on foot a certain other military enterprise, to be carried on from thence against the dominions of some foreign state, to the jurors aforesaid yet unknown, with whom the

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said United States were then and there at peace, against the form of the statute in such case made and provided, to the evil example of all others in like case offending, and against the peace of the said United States and their dignity.

NATHAN SANFORD, attorney of the United States for the district of New-York.

Endorsed.

Circuit court of the United States of America for the district of the second circuit.

The United States of America versus *William S. Smith.*

Indictment.
Sanford, Attorney, U. S.
A true bill—Nicholas Fish.
Filed April 7, 1806.
DUNSCOMB, Clerk.

The defendant upon this indictment pleads Not Guilty.
April 10, 1806. DUNSCOMB, Clerk.

The United States of America versus *William S. Smith.*

On motion of the attorney of the district, the defendant was called on his several recognizances to appear and answer, and to appear and testify at this court; whereupon, and on motion of Mr. Colden, of counsel for the defendant, and on reading and filing a certificate of Joseph Constant, sheriff for the city and county of New-York, stating, "that the said William S. Smith is in his actual custody, at the suit of John Donaldson, on a *ca sa*, for the sum of $2526 23-100, and at the suit of John Livingston on a *capias ad respondendum*, for the sum of eighteen hundred dollars; and further stating, "that the defendant having given the security by the laws of the state of New-York required, has the liberties of the prison of the city and county of New-York;" and praying, that the said defendant and his sureties be discharged from his and their recognizances, which being ordered by the court,

Thereupon, on motion of the attorney of the district, it is ordered by the court, that a bench warrant issue to the marshal of the district, to bring in the body of the said defendant *instanter*, to answer to his indictment.

The marshal returns upon the said warrant to him directed, and delivered as follows, to wit:

"I certify the within named William S. Smith is a prisoner in my actual custody, by virtue of a *capias ad satisfaciendum*, issued out of the supreme court of this state.

JOSEPH CONSTANT, sheriff.

New-York, April 7, 1806."

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"I certify, that the within named William S. Smith is in custody of the sheriff of the city and county of New-York, and that by virtue of a *capias ad satisfaciendum*, issued out of the supreme court of this state.

JOHN SWARTWOUT, marshal.

New York, April 7, 1806."

Whereupon, and on motion of the attorney of the district, it is considered by the court, that the said return is not sufficient; and the court doth thereupon order, that the marshal bring in the body of the said William S. Smith, as directed by the said warrant.

Tuesday, April 8, 1806.

Present, as before.

The United States of America versus *William S. Smith.* } On indictment. The marshal returns upon the bench warrant, which issued against the defendant, "Not found;" whereupon, and on motion of the attorney of the district,

It is ordered by the court, that the marshal make a better return; and thereupon the marshal prayed leave to amend his return, which was ordered by the court.

The attorney of the district presented to the court, and prayed the allowance of a *habeas corpus* to be directed to the sheriff of the city and county of New-York, to bring William S. Smith into court, to testify as a witness on behalf of the United States, on an indictment found against Samuel G. Ogden, which being allowed by his honour the judge *instanter*; thereupon the said William S. Smith was brought into court by the said sheriff upon the said *habeas corpus ad testificandum*; and thereupon the attorney of the district moved, that the marshal execute the bench warrant against the said William S. Smith.

The marshal thereupon applied to the court, which directed that the marshal should execute the said warrant; and thereupon the marshal returned upon the said warrant as follows, to wit:

"I certify, that the within named William S. Smith is in my actual custody, being taken in court.

JOHN SWARTWOUT, marshal.

New York, April 8, 1806."

And thereupon the attorney of the district moved, that the said defendant, William S. Smith, be arraigned on his indictment, which being opposed by the counsel for the said defendant, "For that the said defendant was brought into court upon

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the said *habeas corpus*, to testify on behalf of the United States on an indictment against Samuel G. Ogden, and that the said Samuel G. Ogden had not plead to the said indictment, and that the said *habeas corpus* was an abuse of the process of this court, and that the arrest of the defendant by the marshal, as above stated, was illegal, and that the defendant ought to be discharged therefrom, which being argued by the counsel for the defendant, and by the attorney of the district, and Mr. Edwards, of counsel for the United States; therefore,

It is considered by the court, that the said defendant, William S. Smith, cannot be arraigned on his indictment, until he is disposed of as a witness, for which he was brought into court.

Whereupon the attorney of the district declared to the court, that he did not want the defendant's testimony at this time, and prayed that he be ordered to plead to his indictment, which was opposed by the defendant's counsel; thereupon,

It is ordered by the court, that the defendant plead to his indictment.

And the said indictment being read, thereupon the defendant filed his plea in abatement to the said indictment, sworn to in open court, which plea was also read.

The United States of America versus *Samuel G. Ogden.* — On indictment.—The defendant being called on his recognizance appeared, and the indictment being read, thereupon the defendant filed his plea in abatement to the said indictment, sworn to in open court, which plea was also read.

The United States of America versus *William S. Smith.* — On indictment.—The defendant, William S. Smith, being returned by the marshal of the district in custody; on motion of the attorney of the district,

It is ordered by the court, that the said William S. Smith stand committed to the custody of the marshal of this district.

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Wednesday, April 9, 1806.

Present, as before.

The United States of America versus *Samuel G. Ogden.*

The same versus *William S. Smith.*

On indictments.—The attorney of the district, on behalf of the United States, filed his several demurrers to the several pleas of the defendants; and it being agreed by the parties, and ordered by the court, that the argument upon the said several pleas and demurrers be heard together; thereupon, on motion of the attorney of the district,

It was further ordered by the court, that the defendant, William S. Smith, who was yesterday committed to the custody of the marshal of this district, be brought up by the said marshal;

Whereupon a copy of the said order was delivered to the marshal, and the marshal returned upon the said order, that the said William S. Smith is present in court, in pursuance of the said order; whereupon the attorney of the district moved, that the said several defendants reply *instanter* to the said several demurrers filed to their several pleas, and thereupon Mr. Colden, of counsel for the defendants, prayed for time to join in demurrer, which was refused by the court, and thereupon the defendants severally plead *ore tenus*, that their several pleas are good, and thereupon the attorney of the district prayed leave to bring on the argument on the several pleas and demurrers, whereupon the counsel for the defendant asked for time until to-morrow morning, which was opposed by the attorney of the district; and the same being argued by the counsel for the defendants, and by the attorney of the district;

Thereupon, it is ordered by the court, that the defendant's counsel have time until half after three o'clock this afternoon, and that the argument upon the said pleas and demurrers be then heard.

Mr. Cadwallader D. Colden, one of the counsellors of this court, having used in argument this expression (in a manner deemed impressively contemptuous) that he "*hoped to be able to convince even this court,*" was called upon by the court to apologise for these expressions, or to explain and qualify them in such a manner as may be satisfactory to the court, that they were not used in disrespect to the court, and he having refused so to do, he was considered by the court as in contempt of this court; and thereupon,

It is ordered by the court, that the said Cadwallader D. Colden, be committed to the actual custody of the marshal of this district for his contumacy and contempt of this court.

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The court having received from Mr. Colden an explanation, which appeared to the court satisfactory,

It is ordered by the court, that he be discharged from the custody of the marshal.

William S. Smith, bound by recognizance to appear and answer, and also to appear and testify, &c. &c.

The United States of America versus *Samuel G. Ogden.*

The same versus *William S. Smith.*

On indictments.—The arguments upon several pleas and demurrers in these several causes, came on to be further heard; and the said several pleas and demurrers being argued by the counsel for the defendants, and by the attorney of the district, and Mr. Edwards, of counsel for the United States—thereupon

The court takes time to advise.

Thursday, April 10, 1806.

Present, as before.

The United States of America versus *Samuel G. Ogden.*

The same versus *William S. Smith.*

On indictments.—The court having taken time to advise as to its judgment upon the several pleas and demurrers filed in these several causes, doth now order, That the defendant's several pleas be overruled *on the merits*, and that the defendants severally plead in chief to their several indictments.

The defendant, Samuel G. Ogden, being called on his recognizance, appeared.—On motion of the attorney of the district, that the defendant, William S. Smith, be called on his several recognizances to appear and answer, and to appear and testify, and in case of his not appearing, that his several recognizances be forfeited, which being opposed by Mr. Colden, of counsel for the said William S. Smith, and upon his suggesting to the court, that the said William S. Smith was in the custody of the sheriff of the city and county of New-York, and praying that the said William S. Smith and his sureties be discharged from his and their recognizances for the appearance of the said William S. Smith,

It is ordered by the court, that the said several recognizances be vacated.

Thereupon, on motion of the attorney of the district,

It is ordered by the court, that a bench warrant issue to the marshal of the district, to bring in the body of the said defendant, William S. Smith, *instanter*, to answer the indictment.

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The marshal returns, upon the said warrant to him directed and delivered, "That in obedience to the said warrant, he had the said William S. Smith present in court, and in his custody." Whereupon, on motion of the attorney of the district,

Ordered judgment against the said defendants, upon the said several demurrers.

Whereupon Mr. Colden, of counsel for the defendants, prayed leave to amend the said several pleas in abatement, which being opposed by the attorney of the district,

It is ordered by the court, that the defendants take nothing by the said motion.

Mr. Colden thereupon prayed the court, that the several indictments be quashed upon the evidence before the court, which motion was overruled by the court.

On motion of the attorney of the district,

It is ordered by the court, that the said defendants severally plead in chief to their several indictments. Whereupon,

The said defendants severally plead Not Guilty.

And thereupon the attorney of the district, on behalf of the U. States, moved for leave to proceed to the trial of the said several indictments.

Whereupon, on motion of Mr. Colden, of counsel for the defendant, and on reading and filing the several depositions of the said defendants, stating, "That James Madison, of the city of Washington, William Duncanson, of the same place, and Doctor Thornton, of the same place, Thomas Lewis, now master of the ship Leander, and Jonathan S. Smith, supercargo of the ship Leander, will be material witnesses for the said defendants in the trial of the said several indictments, as they are advised and believe to be true, and that they cannot safely proceed to the trial thereof, without the testimony of them the said James Madison, William M. Duncanson, and Dr. Thornton, Thomas Lewis and Jonathan S. Smith; and further stating, that the distance of the place of residence of the said James Madison, William M. Duncanson, and Dr. Thornton, is so great, that their attendance could not have been procured at this city since the said indictments were found, and that they expect to be able to procure the presence of the said James Madison, William M. Duncanson, and Dr. Thornton, or the benefit of their testimony, by the next sitting of the circuit court of the United States for the district of New-York; and that they have every reason to think, and do verily believe, that the said Jonathan S. Smith and Thomas Lewis, will return to the United States by the ninth of September next, and the defendants will be able to procure their attendance, or the benefit of their testimony, at the next circuit court of the United States for the district of New-York." Thereupon Mr. Colden, of counsel for the said defendants, prayed the court, that the trial of the said

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several indictments be put off until the next stated term of this court, to be held on the first day of September next. And thereupon the attorney of the district, on behalf of the United States, asked leave for time to consider the said motion;

Whereupon, it is ordered by the court, that he have until tomorrow morning to reply to the said motion.

The defendant, William S. Smith, being returned by the marshal of the district, in custody, and being in court,

Thereupon, on motion of the attorney of the district, it is ordered by the court, that the said William S. Smith stand committed to the custody of the marshal of this district.

Friday, April 11, 1806.

Present, as before.

The United States of America versus *Samuel G. Ogden.*

The same versus *William S. Smith.*

On indictments.—On the motion of yesterday to put off the trial of these causes,

The attorney of the district, on behalf of the United States, having submitted to the court, that he had nothing to offer in opposition to the motion; thereupon,

It is ordered by the court, that the trial of the said several indictments be put off until Monday the fourteenth day of July next; at which time, it is also ordered by the court, that a special sessions of this court shall be held for the trial of criminal causes, at the city of New-York, in the district of New-York, in the second circuit; and that the clerk issue the usual process to the marshal of this district, to summon a grand and petit jury to attend the said special sessions.

The foregoing is a history of the proceedings of the court of the United States, in the cases of Messrs. Smith and Ogden, at the term holden in April last, as taken from the minutes of the court. The publisher is happy, however, to have it in his power, through favour of the counsel for the defendants, to lay before the reader a more particular account of the proceedings of the court on the very interesting question, which arose on that occasion, and to give the substance of the arguments that were used by the counsel for the defendants; for the better understanding of which, are subjoined the depositions and examinations of the defendants, which were taken before his honour, judge Talmadge; and which are the illegal testimony alleged by the defendants to have been before the grand jury when the indictments were found.

The examination and depositions were as follow:

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NO. 1.

VOLUNTARY EXAMINATION OF MR. OGDEN.

March 1, 1806.

Samuel G. Ogden brought up this morning upon the warrant issued by me yesterday, and examined as a party charged in having provided and prepared the expedition mentioned in the warrant, says—He is the sole owner of the Leander; general Miranda's name is Francis; he sailed in her, and she was bound to Jacquemel. He prefers not to say what other place the Leander was to touch, or where gen. Miranda was to land, and does not say. There were 180 persons on board, including every person. She had 17 cannon on board, mounted as the complement of the ship. He declines answering any question relating to the vessel's cargo, or what was in her hold.

The persons who went out in the Leander, are set down in a list, a copy of which he annexes hereto.

The persons on board were not organised as a troop to act in any military duty, other than to defend the vessel in case of attack. He does not admit he has set on foot or prepared any expedition of a hostile nature against any foreign state. He first saw gen. Miranda the 27th or 28th of Dec. last, then in New-York, where he remained principally till he sailed in the Leander. The general lodged at Mrs. Avery's, State-street, in this city.

SAMUEL G. OGDEN.

Taken and subscribed before me the first day of March, one thousand eight hundred and six.

MATTHIAS B. TALMADGE.

NO. 2.

OGDEN'S DEPOSITION.

District of New-York, to wit.—Samuel G. Ogden, of the city of New-York, merchant, sworn to make true answers touching a certain expedition, fitted out and sailed from this port, in the Leander, deposes, that col. Smith had no particular agency in fitting out the ship Leander, or procuring the cargo. This deponent did that himself. Col. Smith and gen. Miranda were frequently together; William Armstrong was the principal agent of this deponent in procuring certain articles of the cargo of the ship, and getting the men on board. There were pikes, cannon, and cutlasses, for the use of the ship, on board. Gen. Miranda is gone out in the ship as passenger merely; is bound to a place, as he this deponent thinks, in lat. between 10 and 15 N. and longitude between 60 and 75 W. Gen. Miranda was to land, as was intended, either upon an island, or on the Spanish Main,

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within that latitude and longitude. That the men on board were at liberty to act, or not to act, in any enterprise with gen. Miranda, as they should agree, or to land with the general, or not to land, at their pleasure. Gen. Miranda was born, as he has understood, in the province of Caraccas, and he thinks in the town of Caraccas, where he had a great number of friends. That gen. Miranda showed this deponent a great number of papers in the Spanish language, the substance of which, as he told him, were assurances from his friends at Caraccas, that they would assist him in any views they might have when he arrived there. They were papers both recent and old, and some of them very recent, and mostly received by gen. Miranda while in Europe; that gen. Miranda came here from London, and brought with him a letter of credence on Daniel Ludlow, of this city, for 800l. sterling, which sum this deponent received from Mr. Ludlow for gen. Miranda.

The engagement between this deponent and gen. Miranda is, that the Leander shall carry what she has on board to the port of destination, and the captain of the ship is there to receive, for this deponent, in cash, its price and the amount of the outfit, and 200 per cent advance on the amount of the cargo and outfits; the vessel is then to proceed to Jacquemel, and with the cash to purchase a return cargo of coffee. This deponent has several bills on London, drawn by gen. Miranda, to the amount of 2000*l.* sterling; one on Nicholas Van Sittart and John Turnbull; the others on Trinidad, to the amount of about 5000*l.* sterling on Joseph Lambert and William Brown, merchants, for which he is to give gen. Miranda credit when paid. This deponent saith, the amount of the cargo on board the ship Leander is about forty thousand dollars; the outfits he estimates at thirty thousand more. Gen. Miranda is at liberty to receive, or not to receive the cargo, when it arrives at the port of destination. The estimated amount to be received there was about 217,000 dollars.

This deponent further saith, that gen. Miranda went to Washington not long before he sailed and, as he understood, was introduced to the officers of our government; and this deponent understood from gen. Miranda, that he had several interviews with the president and Mr. Madison, and conversed among other general topics with them, upon the subject of the situation of South America, and the oppression of its inhabitants.

That from conversations between this deponent and gen. Miranda, this deponent understood the Leander was to land her cargo and gen. Miranda, near the town of Caraccas, in the province of Caraccas, so that the same might be conveyed to that place. That the military force of Laguira, he understands, is about five hundred men. This deponent understood from gen. Miranda that he was on good terms with the British government, and that that government were disposed to promote and second his views upon the Spanish Main. The ship's cargo was

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furnished at the request, and according to the directions of gen. Miranda, and she is expected to return in all the month of March, and not expected to stay at the port of her destination more than about a fortnight.

Question. What arms were on board the Leander when she sailed?

Answer by this deponent. Pistols, pikes, muskets and cannon, cutlasses or sabres, and bayonets. This deponent does not recollect of any other arms on board.

There were between one and three hundred pistols, bought of various persons in the city; about four or five thousand pikes; between five and six hundred muskets; between thirty and forty cannon in the hold, among which were two brass pieces, four pounders, and carriages for all the cannon; not so many bayonets as muskets. The cannon were procured from gen. Stevens, Corp, Ellis and Shaw, Ripley, Center and Co. and Bernard Hart; ten or twenty tons of cannon ball, one half ton of musket balls, one hundred and fifty quarter casks of powder, bought of Low and Wallace, and Jonathan Ogden; about one or two dozen saddles and bridles, blue cloth jackets and Russia sheeting trowsers, such as are worn in the West Indies, made by Mr. Weyman, about one thousand or fifteen hundred in number; the quantity of articles, arms and equipments, were purchased according to the advice of gen. Miranda. All the above articles, this deponent believes, were put on board before the vessel dropped down to the Narrows; and to the best of this deponent's knowledge, recollection and belief, the above warlike articles were designedly omitted to be entered in their proper name in the captain's manifest of the vessel's cargo. This deponent does suppose, from his knowledge of the expedition, that there was to be some arrangement among the men on board the Leander as to subordination of rank, after their arrival to their destination.

Question. Did you not understand from gen. Miranda, that it was his object to heave off the yoke of the present Spanish government from the inhabitants of the country, to which he was bound?

This deponent answers, that he understood his object was to relieve the people from oppression; but did not understand how this was to be effected by him, and does suppose the above warlike articles were intended as auxiliaries in effecting that object. This deponent further said, that he was introduced to gen. Miranda by col. William S. Smith, as he recollects.

SAMUEL G. OGDEN.

Sworn the 1st day of March, 1806, before me,

MATTHIAS B. TALMADGE.

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NO. 3.

VOLUNTARY EXAMINATION OF COL. SMITH.

District of New-York, ss. William S. Smith brought up by a warrant issued against him upon suspicion of his having been concerned in preparing the means of an expedition against a foreign state, on board of the Leander, on his examination voluntarily says, that he knows general Miranda—his christian name is Francisco. This examinant has every reason to believe, that general Miranda sailed in the Leander, which vessel was bound to Jacquemel. Gen. Miranda stated to this examinant, that he had been invited by his friends at Caraccas, his native country, to return to his native place. Caraccas is a Spanish province on the Main, in South America. That gen. Miranda invited this examinant to accompany him there, which this examinant declined, unless it should be by the permission of this government. That gen. Miranda thereupon went to the city of Washington, and as he stated to this examinant, communicated the object of his return to Caraccas to the president of the United States and the secretary of state; and, if they should admit him to a second interview, he, the said general Miranda was at liberty to ask of them permission for this examinant to return with the said gen. Miranda to his country. That while gen. Miranda was at Washington, he wrote to this examinant, that he had had those interviews with the president and secretary of state, and made the request in favour of this examinant aforesaid, that he was answered by the president and secretary, that it would not be correct for them to give this examinant a letter of service, as it might commit our government; but that this examinant was at liberty to go if he pleased, and this examinant did thereupon relinquish the idea of accompanying him the said gen. Miranda. That gen. Miranda inquired of this examinant about a vessel proper to be employed for his use in returning to his country. This examinant, for the purpose of procuring a fit vessel, introduced him to a captain Lewis, who had commanded a vessel in the West-India trade, and Mr. Lewis referred him to Samuel G. Ogden, of this city, as the owner of a vessel proper for his use, and as being then in the West-India trade. That this examinant was informed, that Mr. Lewis and gen. Miranda, went to Mr. Ogden's to treat with him about the engagement of the said vessel: and this examinant has been informed, by the said gen. Miranda and Lewis, that the agreement was made with Mr. Ogden, that the vessel called the Leander should go out with gen. Miranda, bound to Jacquemel, and from thence should take him over and land him upon the Spanish Main, as near the town of Caraccas as might be; or if this could not be conveniently done, was to bring him back again to the city of New-York. That this examinant has been a long time an intimate friend of gen. Miranda;

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and when this examinant was by him solicited to suffer the son of this examinant, William Steuben Smith, to accompany the said gen. Miranda to the Spanish Main, this examinant consented, and suffered his son to go with him on board the said vessel Leander, under promises from his said friend the said gen. Miranda, that the said William Steuben Smith should be taken care of by him as a father. That gen. Miranda represented to this examinant the distressed and oppressed situation of the people of that country to which he was bound, and that the people were generally desirous that a change should take place as to their political situation, and that the said gen. Miranda had that object very near his heart, and it was his wish and intention to effect it if it could be done; and the said gen. Miranda represented to this examinant, that on his arrival there he should be in the bosom of his friends, whom he expected would join him in endeavouring to heave off the yoke of the present Spanish government from the people of that country; and this examinant understood from gen. Miranda, that he was to proceed to extremities to separate that country from the Spanish government, if he found the people favourable to such an event; that gen. Miranda told this examinant, that he had freely and openly communicated his views and plans to the president of the United States and Mr. Madison, upon the subject of his return to his native country, and that the president and secretary told him, the said gen. Miranda, that they were not now ready to go to war, and could not give him any public aid or countenance, but that they had no objection that any individual citizens of the United States should engage in such an enterprise, provided they did not thereby infringe any of the laws of the United States. That on the Saturday before the said gen. Miranda left this city, on board the said Leander, he wrote two letters—one to the president of the United States, and the other to the secretary of state of the United States, which this examinant saw and read, and which this examinant put himself into the post-office of this city, to be forwarded; the contents of which were, that the said gen. Miranda had finished his business in this city in a decorous manner, and in a way, he hoped, that would be pleasing to them, the president and secretary; but that the said letters did not explain what that business was, nor what he the said gen. Miranda had done. That gen. Miranda informed this examinant, that he was on good terms with the British government, and had been some time in England, and lately came from there to this city, and that the said British government were now favourable to the project of liberating the said Spanish country from the oppression of that government. That this examinant's son went with Miranda as a companion, who was to take care of him and provide for him for life; and it was left to gen. Miranda, in case there was a necessity to proceed to extremities in favour of his friends, and to free his native country, to provide for this examinant's said son as he should think fit, in relation to promotion and command. This examinant does not know how many

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men were on board the Leander; that she cleared out with one hundred and fifty men in her manifest; but this examinant understood from capt. Lewis, that there were more than one hundred and fifty men on board, to wit, one hundred and eighty; that about thirty of this last number were passengers on board, and went as attendants of gen. Miranda. That this examinant, at the request of gen. Miranda, asked and engaged about fifteen or twenty men himself to accompany him; and this examinant also desired John Fink, of the Bowery-lane, butcher, to engage some more men, and who thereupon did engage about twenty-three to go on board as part of the crew of the Leander. The ordinary crew of the vessel is about 150 men; that the monthly compensation and payment of the one hundred and fifty men, who went on board as aforesaid, were to have common wages, fifteen dollars per month; but those who went as attendants on the general were not stipulated with as to their wages or compensation; that the aforesaid men, who were engaged by Mr. Fink, were to serve as marines on board of the ship, and observe the orders of capt. Lewis, and on the land obey the orders of the general; that the name of the general was not mentioned to the said men; that subordination of rank was contemplated to be made while on board of the said vessel, and to take effect in case they should land and go into land service; that in the organization of these men, those fifteen or twenty mentioned as attendants of gen. Miranda, were to have command as officers, and be subject to the arrangement of the general in that respect; the others, who were engaged by Mr. Fink, were to attend the general on land on horseback as a body guard; that not a man of those engaged on board as aforesaid, knew where they were to go, or the nature of the service, and all were engaged without any knowledge of the object of the enterprise. This examinant does does not know that any of them signed any articles to go, and all, except those who were particularly to attend gen. Miranda, were engaged at ordinary seamen's wages, fifteen dollars a month. This examinant is positive, that there were no representations made or authorised by him, that the engagement was for the service of the United States, nor any false objects held out to view—the service was declared to be secret and optional. That this examinant received of Samuel G. Ogden, aforesaid, the advance of a month's pay to all the men engaged by Mr. Fink, which he this examinant gave to Mr. Fink to pay the said men, the whole sum being about three hundred and twenty dollars, and which Mr. Fink receipted to this examinant as received from capt. Lewis, as payment of part of the crew under his command on board the Leander. The men were told they were to have horses provided for them where they should land. This examinant was told by the captain there were arms and ammunition on board the Leander. This examinant did not make any advances to his son, except pocket-money to equip or prepare him to go: he is nineteen years old; but this examinant gave him letters of credit,

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authorising him to draw upon this examinant in case he should wish to return, for his accommodation and expenses home. This examinant was informed of the bargain between Miranda and Ogden for the voyage of the Leander, and her cargo very soon thereafter—he thinks next day. This examinant thinks the residue of the men on board the Leander, not engaged, as aforesaid, by himself and Mr. Fink, were engaged by the captain thereof, and several by a capt. Armstrong, who is himself on board. This examinant knew that this expedition was going on from the time of the return of gen. Miranda from Washington, and supposed it was with the knowledge and consent of the president and secretary. This examinant was informed by general Miranda, that he had fully communicated the views and objects of his enterprise to Rufus King, of this city, who, this examinant was informed, thought well of the expedition.

W. S. SMITH.

The above examination was taken and subscribed before me this first day of March, 1806.

MATTHIAS B. TALMADGE.

On Tuesday the 8th of April, Messrs. Ogden and Smith, being separately called upon to plead to their indictments, respectively put in their pleas in abatement, verified by affidavit, which pleas were substantially as follows: That the grand jury, by whom the bill of indictment was found, previously to the finding thereof, had before them illegal testimony, and such as, by the laws of the land, ought not to have been before the said grand jury previously to their finding the said bill of indictment; and that the said defendant, on the first day of March last past, was arrested by virtue of a warrant issued by the honourable Matthias B. Talmadge, esq. district judge of the United States for the district of New-York, and thereupon carried before the said judge, and was then and there sworn, and examined by the said judge touching the supposed offences charged in the said indictment, and was then and there illegally, and against his will, forced and compelled by the said judge to answer certain questions touching the said supposed offences, in the said indictment contained, which said examination and deposition of the said defendant were reduced to writing by the said judge, and the said defendant was then and there by the said judge illegally, and against the will of him the said defendant, compelled to sign the same, and to swear to the same as the same were so reduced to writing and signed, and that the deposition in writing of one (the defendant in the other cause) taken before the said honourable Matthias B. Talmadge, esq. in the absence of the said defendant, together with the aforementioned legal deposition and examination of him the said defendant, were, before the said indictment was found, illegally laid before, and were before the grand jury, who found the said bill of indictment, and this he is ready to verify, &c..

After these pleas had been filed, the district attorney prayed time until the next day to consider what measure he should adopt,

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which was immediately granted by the court, without any opposition on the part of the defendants.

On the next day, the district attorney filed his demurrers to those pleas; and the counsel for the defendants prayed time to join in demurrer till the next day, in order that they might be prepared for the argument. This was resisted by the district attorney, who prayed that they might be compelled to join *instanter*. This gave rise to a desultory discussion; in the course of which, he said, that the pleas were frivolous; so frivolous, that he would have been justified in taking no notice of them as pleas. Mr. Colden, in reply, mentioned, that by the demurrer, the facts stated in them were confessed, and asked, is it frivolous to allege, that the party has been indicted on illegal testimony? Is it frivolous to allege that testimony, which the party was compelled to give against himself, has been laid before the grand jury which found the bills? We hope to be able to convince, *even this court*, that the plea is not frivolous. Here he was interrupted by judge Talmadge, who immediately called on him for an explanation of what he meant by the words, *even this court*, and asked him whether he had intended to say that the court was prejudiced or partial? Mr. Colden answered, that the words must speak for themselves; that he did not think they imported any such meaning; that he thought the court ought not, and could not examine him, so as to draw from him answers which might criminate himself, and that he was not prepared to give any explanation on the subject. The judge then ordered him into the custody of the marshal. While the order of commitment was preparing, Mr. Colden appeared to consult with some of his friends immediately about him, and again addressed the court, stating that he knew it had the power of committing him, and that he had no appeal to any other tribunal; that he had no disposition, where professional duty did not require it, to enter into a struggle with such disparity of strength, or to make unavailing efforts against irresistible authority; that he had therefore committed to paper an explanation, which he begged leave to read, and which was as follows: "By the words, *even this court*, I meant to express a hope, that (notwithstanding the court was composed of the magistrate who took the depositions below, and who therefore may be supposed to have his mind influenced by testimony, which he ought not to have heard, and which it was supposed could not have been offered in court here) I should be able to convince, even this court, though it might be more difficult so to do, than to convince a court, the members of which were new to the business.—I meant no contempt of the court."

Judge Talmadge then asked Mr. Colden for the paper he had in his hand, which the latter declined giving, saying it was only his notes, from which he had spoken. He, however, by desire of the judge, again read over the paper he had written; upon

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which his honour said, the apology was sufficient; and told the marshal that he might discharge *that man* out of custody.

The discussion relative to postponement of the argument on the demurrer, was then renewed. Mr. Emmet stated, that from the nature of the facts set forth in the pleas, he had rather expected the district attorney would have taken issue on them, than admitted them by demurrer; that therefore the whole of his attention, and he believed also of that of his associate counsel, had hitherto been directed to the best manner of supporting the plea before a jury; that therefore the demurrer was a surprise upon him, and he was not prepared to argue it, except on the general principles which first suggested to the defendant's counsel the propriety of the plea. He observed further, that no objection had been made to indulging the district attorney with time for consideration yesterday, because the pleas were probably not expected by him; and there was no wish on the part of the defendant's counsel to obtain any advantage by surprise.

The court then observed, that if the defendant's counsel were really unprepared, they should be indulged with time till the afternoon, but no longer; and at half past twelve adjourned till three o'clock.

The sitting of the court being resumed, the district attorney began by stating some *formal* objections to the plea, which it is unnecessary to mention here, as the judgment of the court was founded exclusively on the general objection on the merits, that no such plea would lie.

On this general question he argued, in support of the demurrer, that this plea was a perfectly novel experiment, for which no precedent or authority could be found. This very novelty was conclusive evidence that it would not lie; for otherwise it is inconceivable that it should not have been made use of before now. It manifestly appears, from the silence of all the elementary writers, that there can be no such plea in abatement. Lord Hale (2 Hale's Pl. Cr. cap. 30, p. 236) details all those pleas, among which such as this is not to be found. They are, according to him, 1st. Such defects as arise upon the indictment itself, and the insufficiency of it. 2d. Such defects as are in matters of fact, *as misnomer or false addition of the prisoner;* and, 3d. By matter of record. The acts of grand juries are not to be brought into court and questioned in this way; they are independent and irresponsible; they judge for themselves of the testimony upon which they ought to find indictments, and no one has a right to inquire; nor has he, without a violation of the grand juror's oath, the means of knowing what evidence they may have had before them. No injury can result from this; for it is the duty of the grand jury to decide on *ex parte* evidence; and if they decide wrong, or prefer a false charge, the natural and the only remedy is, that the accused will be acquitted on his trial before the petty jury. The object of the grand jury is only to judge whether

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there is probable cause for putting a party to answer a charge, and therefore it should not be bound down to the same strictness of investigation as the tribunal which is ultimately to decide upon the charge. The counsel for the defendant have probably been led to adopt this step, by Dr. Dodd's case; (1 Leach's Cases in Crown Law, 184) but in truth it is an argument against them; for it is no precedent of a plea in abatement. If such a plea would have lain, why was it not adopted in that case? On the contrary, the matter there submitted to the court, was laid before it on a summary application; which clearly shows, that the prisoner's counsel had no idea it could be taken advantage of in any other way.

The defendant's counsel replied as follows:

Among the authorities cited on the opposite side, is the arrangement in 2 Hale's Pl. Cr. chap. 30, p. 236, of pleas in abatement of the indictment; and from the circumstance that a plea similar to that now under discussion is not found there, it is inferred, that no such plea can exist. But it appears that Lord Hale's arrangement has not been very accurately examined. He classes those pleas as follows: 1st. On such defects as arise upon the indictment itself and the insufficiency of it. 2d. Such defects as are in matters of fact, as misnomer or false addition of the prisoner; and, 3d. By matters of record. Now, we do not see why our plea does not come under the *second* of those heads; for it is a mistake to confine that head merely to misnomer or false addition of the prisoner. The arrangement comprehends pleas from such defects as are on the face of the indictment itself, which perhaps more properly ought to be called demurrers; 2d. Such as arise from matters *dehors* the indictment *in fais*; and, 3d. From matters *dehors* the indictment *of record*—comprehending every possible matter that can arise. Is not the circumstance alleged in our plea, that illegal evidence has been offered to the grand jury, if it be true matter of fact and *dehors* the indictment? And does it not exactly class itself under the second head of Lord Hale's arrangement? If it does not, and that head must be considered as comprehending only the two cases that appear to be mentioned, merely for the purpose of illustration, then his classification is insufficient, and in proof of that assertion we specify a plea in abatement unquestionably good, which is equally excluded from his arrangement. This is to be found in *Bro. Abr.* title, Indictment 2. "Note, that where a man is indicted of felony by those, of whom part are indicted or outlawed of felony, and others acquitted by pardon, so that they are not *probi nec legales homines*, there it was agreed, that the indictments by them presented shall be void, and the parties who are indicted shall not be arraigned on this; *and note, that this matter ought to be pleaded by him who is arraigned on this indictment, before he pleads to the felony.*" On this quotation, let it be observed for the present, that it furnishes proof of a plea in abatement arising from

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matter of fact, *dehors* the indictment, and not from misnomer or false addition of the prisoner, but from matter relative to the grand jury; and it is therefore so far precisely parallel to that before the court. Having thus endeavoured to set aside the respectable authority of Hale, if it could be considered as furnishing any argument against us, let us proceed to consider the general principles on which our plea can be supported.

It is a fundamental doctrine in the law, that there is no wrong without a remedy, and no right without the means of enforcing it. Apply that to the present case. Is it not a wrong to be accused and subjected to prosecution on illegal evidence; to be injured in character, in peace of mind, and in the trouble and expense of defending one's self against an indictment, which by the rules of evidence and law ought not to have been found? If so, what is the remedy? Is it not the right of every man that he shall not be put to answer to an indictment, unless it shall have been found according to the rules of law? And if so, what are the means of enforcing that right? A grand jury, it is true, ought to listen only to *ex parte* evidence; but that should be of such a nature as would be received to support the prosecution before a petty jury, and such as, if uncontradicted and unexplained, would induce a conviction. The rules of evidence, are the result of accurate reasoning, and of a strict regard to the rights of those, whose persons or property are to be affected. That reasoning is equally accurate, and those rights ought to be equally sacred, whether the investigation be before a grand or petty jury. Those rules of evidence are not the result of any statutory regulations, but are adopted on account of their wisdom, justice, and universal applicability. What is there in the nature of grand juries, in the purposes for which they were instituted, or the objects they are to attain, that ought to enfranchise them from those rules of wisdom and of justice, which are also of universal applicability?

But the attorney general insists, that grand juries are independent and irresponsible; judging for themselves as to the grounds on which they will prefer an accusation, and that no one has a right to investigate or to know what evidence they have had before them. This doctrine is broadly denied; and we do so from regard to an institution, which we have been habituated to love, and do not wish at this day to learn to detest. Grand juries are the offspring of free government; they are a protection against ill founded accusations; and the necessity of their originating bills of indictment, is supposed to be infinitely more friendly to liberty, than the mode of proceeding by information; but if their powers were of such a nature as we have heard described, we should advise the friends of freedom and security to seek for the abolition of such an odious institution, and to throw themselves at once upon the mercy of the public prosecutor. What frightful privileges is it alleged to possess? Hearing only *ex parte* evidence, secret in its deliberations—irresponsible for its

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decisions, and bound in its investigations by no rules of law! Does this fall short of what we have heard or read of respecting the most despotic tribunals in the most enslaved countries? The powers which it in fact possesses, of deciding only on the evidence for the prosecution, and of keeping its deliberations secret, are in themselves sufficiently serious; but they are controuled and prevented from becoming dangerous by this, that it is bound to investigate according to the rules of law. It is at liberty to range through the wide extent of the community in pursuit of crime; but it is confined to travel in its pursuit only by the established paths of evidence.

From whence too does the attorney general infer, that grand juries are irresponsible? Is it from the power anciently claimed by judges of fining them for misconduct? We do not pretend to say that such a power ought to be revised—but the frequent exercise of it in former times, shows that their acts have always, from the earliest periods, been considered as subject to investigation and punishment; and at this day it will not surely be questioned, that if a grand jury grossly misconducted itself from corrupt motives, the members so offending might be prosecuted by information or indictment, as is specified in 2 Hale's Pleas of the Crown, 159-60; where he also mentions the 3 Hen. 7. c. 1. empowering justices of peace, oyer and terminer, or gaol delivery, to impannel another inquest to inquire of the concealments of a former one, for the purpose of punishment.

If they are not irresponsible, and that their acts may be inquired into, let us see whether there be any thing in the secrecy of grand jury proceedings, to prevent our being at liberty to allege that illegal evidence was offered to them. It might perhaps be adviseable to ascertain with more precision than is already done, in what the secrets should really consist—but without entering into any discussion of that kind, it may be sufficient to observe, that although the sentiments expressed by jurors, and the facts disclosed by witnesses to them, are secrets, the names of those witnesses never can. Those are facts which any man may learn, by placing himself at the door of the grand jury room, or by looking at the names indorsed on the bills after they are found. We may say further, that no *unlawful act* done in the grand jury, is such a secret as jurors are bound by their oaths to keep. If a bill of indictment were found by less than twelve of the jury, surely no man is restrained from disclosing that. If a bill of indictment be found in another unlawful way, by the admission of illegal evidence, is that violation of law more protected by the obligation of secrecy? It would be competent to him, against whom an indictment had been found by only eleven jurors, to avail himself of that fact, and to get rid of the accusation—why is it not equally competent to the man, who is indicted on evidence which the grand jury ought not by law to have received, to insist for the same purpose on the illegality of this procedure.

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We have established that grand juries are not independent of either the law or the court; let us now examine whether they are exclusively competent to judge for themselves as to the grounds on which they will prefer an accusation. To that doctrine may be opposed the well known maxim "*ad questiones legis, respondeant judices, ad questiones facti, juratores.*" That maxim so accurately marks the distinct and constitutional provinces of judges and juries, that we cannot hesitate to apply it equally to grand as to petty juries. They are each of them subordinate parts of the criminal system, obviously instituted for the ascertainment of facts; and, as to matters of law, under the guidance and controul of those with whom is deposited the interpretation of the law. If then it shall at any time in the course of the proceedings appear to the judges, that the grand jury are about to err, or have erred in matter of law; in the first case, the court will prevent their error, by giving them proper information; in the other case, where an error has been actually committed, the court will interfere, and prevent any injurious consequences from the mistake. Every day's experience shows us grand juries applying to the court for advice in matter of law, and the court directing them as of right and as a part of its duty. There are two cases which immediately present themselves, and are illustrative of those two positions. In the one, the court prevented the error which the jury was about to commit; in the other, if the alleged error had been actually committed, the court manifestly would have interfered, and prevented any injurious consequences from the mistake. The first is Denby's case, 2 Leach's Cr. Ca. 580; the other is Dr. Dodd's case, 1 Leach's Cr. Ca. 184, and both prove that illegal evidence shall not be permitted to go before the grand jury. In Denby's case, that body, suspecting Denby himself (who was examined as a witness before it against one Edwards) of prevaricating, applied to the court for his depositions taken before the magistrate, pursuant to the statutes of Philip and Mary. But the court refused, because while Denby could be had, they were only secondary evidence, and would be therefore illegal. The judges did not say to the jury, "You are independent and irresponsible, and you must decide for yourselves as to the grounds on which you will find indictments; therefore, as you ask for those depositions, take them, though they are not strictly legal evidence." No; their answer substantially establishes, that whatever is not legal evidence, shall not go before the grand jury, and that it is not that body, but the court, which is to decide on the legality of the evidence on which an indictment is to be found. In Dr. Dodd's case, he stated to the court, when called upon to plead, that the indictment was found on the testimony of an incompetent witness. Did the court answer—'with that we have nothing to do; the grand jury only is competent to decide as to the evidence on which it will find indictments?" No; the judges instantly received the objection, and determined, that if the grand jury had

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found a bill on illegal evidence, they would interfere and prevent any injurious consequences to the prisoner. The point was argued by some of the most able lawyers at the bar, and submitted to the twelve judges; and it was only because they decided that the witness was competent and the evidence legal, that the objection did not avail—from which it manifestly results, that where the evidence on which a bill of indictment has been found, is confessedly illegal, the court should interpose, and prevent the accused's sustaining any injury from the error of the jury.

But, says the attorney general, if a grand jury do wrong, and find an indictment on illegal evidence, the remedy, and the only remedy is, that the accused will be acquitted on his trial, before the petty jury. That this is not the *only* remedy, is clearly established by the two cases last cited. Let us further examine, whether it be *any* remedy for the wrong done to a citizen by being illegally indicted. Suppose a case of misery often witnessed; a wretch, after being indicted, unable to find bail—or a man indicted of a felony, in which bail would not be received; suppose further, what not unfrequently happens, a court limited like this as to the duration of its sittings, and so pressed with business, that part must be postponed—would it be any remedy to a man illegally indicted, and obliged to remain in prison till September next, that in September next he would be acquitted and discharged? Is such an acquittal a remedy for a moment's imprisonment, for anxiety of mind, derangement of affairs, suspension or loss of character? If not, we revert to the established maxim, "there is no wrong without a remedy," and ask, in this case, what is the remedy? or, at least, what is the remedy exclusive of that which we have adopted?

But great stress is laid on the novelty of this plea, and on its being entirely without precedent. Whether it be so entirely without precedent, shall be examined presently; but let us now take for granted that it is so. This certainly imposes on us some difficulty; but it only imposes one which has been gotten over in a case very nearly similar. It has been already shown from Brook's Abridgment, title Indictment, § 2. that where some of the grand jury were indicted or outlawed of felony, it might be pleaded in abatement of the indictment. As far as we can find, there is but one instance of such a plea, and that in the reign of Charles I. Sir William Whithipole's case, reported Cro. Car. 134; that this was the first instance of such a plea, is manifest from the reporter's expression, that "because this was *the first plea* that had been upon that statute, and would be a precedent in crown matters, the court would advise." Here then is a plea, the like of which had never been produced before the time of Charles I. and yet its entire disuse and novelty formed no ground for its rejection. Since the days of Charles I. there has been no precedent of any thing like it. If then that solitary case had not accidentally happened to occur, the same objection of novelty would as strongly apply to that plea, which is unquestionably

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good, as it can to that which we have offered to the court. But novelty only imposes on us the necessity of more accurately investigating the principles of law, on which we rely; if our deductions from them be well founded (and we trust they are) the objection of novelty vanishes.

Along with this objection of novelty may be classed another; namely, that supposing the court will interfere in a case like this, we have mistaken our application; and to that was pointed the attorney general's expression, that Dr. Dodd's case is no precedent for a plea in abatement. To that we answer, 1st, that there may be more ways than one of applying to rectify the same error; and, 2d. That emphatically the most correct and proper way of applying to rectify this error, is by a plea in abatement. The first position may be illustrated thus. It is laid down in Hawk. Pl. Cr. b. 2. ch. 25. § 16, that any one who is under a prosecution for any crime whatsoever, may, by the common law, before he is indicted, challenge any of the persons returned on the grand jury, as being outlawed for felony, &c. or villeins, or returned at the instance of a prosecutor, or not returned by the proper officer, &c. Here then is a summary mode given to the accused of objecting to grand jurors, either by challenging the array, or challenging the polls, as the case may require; but has he no other mode? Sir William Whithipole's case, Cro. Car. 134; and Brooke, in the paragraph already cited from him, tells us, that these objections may be pleaded in abatement; and Lord Coke (3 Inst. 34.) says, "the safest way, for the party indicted, is to plead, upon his arraignment, the special matter given unto him by the stat. of 11 Hen. 4. for the overthrow of the indictments, with such averments as are by law required (agreeable to the opinion of lord Brooke, *ubi supra*) and to plead over to the felony, and to require counsel learned for the pleading thereof, which ought to be granted, and also to require a copy of so much of the indictment as shall be necessary for the framing of his plea, which ought also to be granted—and these laws made for indifferency of indictors, ought to be construed favourably; for that the indictment is commonly found in the absence of the party, and yet it is the foundation of all the rest of the proceedings." Here then is a case where an objection to the grand jury may be taken advantage of either by a challenge to the jury, or by a plea in abatement, at the option of the defendant. Further, cases frequently occur, in which an indictment is quashed, on motion for error on the face of it, which might have been the subject of demurrer, or of arrest of judgment; but was it ever said in any of these cases, that because you have the first remedy, you cannot have the last? On the contrary, summary applications on motion, particularly in criminal cases, are comparatively of modern invention; for the most part introduced for the ease of the defendant, and to save him from the technical nicety of formal pleading; but they were never intended to deprive him of the benefit of such pleading, should he judge fit to resort to it.

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Dr. Dodd's case, however, can be considered in no other light than as furnishing a plea in abatement, pleaded *ore tenus;* he averred, that the indictment was found on illegal evidence, which he set forth, and submitted that he ought not to be compelled to plead the general issue. Have not this allegation and prayer all the substantial requisites of such a plea? But the facts which he averred, being admitted, there was no necessity for putting it into form, and the law arising from them was argued as on a demurrer. Had the facts, however, been disputed, and the law indisputable, what should he have done? The answer to this question leads to the discussion of our second position—that emphatically the most correct and proper way of applying to rectify this error, is by a plea in abatement. Had the facts been disputed, should they have been ascertained by a war of affidavits submitted to the judges, who are not the competent organs for ascertaining facts? No, *ad quæstiones facti respondeant juratores.* If the facts alleged would afford sufficient ground for quashing an indictment, but their truth be controverted, a jury must decide on their truth; a jury cannot decide on their truth without an issue joined; an issue cannot be joined without a plea put in; and no plea can be put in but a plea in abatement. It follows, therefore, that wherever the facts are capable of being traversed, the only correct way of bringing them forward, is in the form of a plea tendering an issue—the ancient and strict rules, of which the defendants have not lost the benefit, know no other way of bringing before the court facts that ought to prevent an accused person answering an indictment, than by pleading them, that if denied, their truth may be tried by those who are to try the truth of facts; and if admitted or proved, they may appear upon the record, and bring it to a legal termination. Any other way is an innovation—useful in many cases, frequently an advantage to the accused—but one which he may waive, if he prefer the original mode of pleading.

As to the formal objections which were taken, the counsel for the defendant replied to them; but, stated, that the facts contained in their pleas had come to their knowledge so very short a time before the defendants were called upon to plead, that they had no time to re-peruse them; and were obliged to file the original draughts, without even taking copies; that therefore, if the court should think any of the formal objections valid, they would pray for liberty to amend; which they had no doubt it would be ready to grant, under the circumstances of these being criminal cases, in which the defendants should not be entangled by niceties, and of there being no precedent to which the counsel could have had recourse for their guidance.

Mr. Edwards replied; but confined himself entirely to the formal objections, and did not enter into the general question whether such a plea would lie. After he had concluded, the court adjourned till the next day.

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THE TRIAL

OF

WILLIAM S. SMITH.

THE court met and opened at eleven o'clock.

Present, the Honorable William Patterson, one of the judges of the supreme court of the United States, and

The Honorable Matthias B. Talmadge, judge of the district of New-York.

Counsel for the Prosecution.

Nathan Sanford, district attorney of the United States; and Pierpoint Edwards.

Counsel for the Defendant.

Messrs. Washington Morton, Cadwallader D. Colden, Josiah Ogden Hoffman, Thomas A. Emmet, Richard Harison.

The names of about sixty persons were called over at the request of the district attorney, as witnesses on the part of the United States. *Colden*, in behalf of the defendant, gave a list of witnesses to the clerk, whose names were called at his request, as follows:—

List of Witnesses for the Defendant, July 1806.

Stephen R. Bradley,	absent.	Samuel L. Mitchill,	absent.
Robert Smith,	a.	Marquis de Casa Yrujo,	a.
William Thornton,	a.	Thomas Law,	a.

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James Madison,	absent.	Ebenezer Stevens,	absent.
Albert Gallatin,	a.	Samuel Winship,	a.
Henry Dearborne,	a.	Harman Brinckerhoof,	a.
Gideon Granger,	a.	Aug. B. Woodward,	a.
Jacob Wagner,	a.	Samuel Osgood,	a.
Thomas W. Eppes,	a.	Wm. Duncanson,	present.
Samuel Smith,	a.	Rufus King,	p.
George Clinton,	a.	Jacob Hagerman,	p.
George Clinton, Jun.	a.	William Minugh,	p.

Colden read a subpœna, directed to James Madison, esquire, whereby he was commanded to appear at the present circuit court, to testify in behalf of the defendant. Also the copy of the subpœna ticket, and read an affidavit in the words following:

City and County of New-York, ss. Charles Lindsey, attorney at law, being duly sworn, saith, that on the twenty-eighth day of May last he served on James Madison the writ of subpœna hereunto annexed, and also at the same time delivered to the said James Madison a ticket of subpœna, a true and perfect copy whereof is also hereunto annexed, and this deponent further saith that at the time of shewing the said writ and of leaving the said ticket, he offered to pay to the said James his reasonable expenses, and tendered to him twenty dollars which the said James would not accept, saying, "that "he would not take them now, and that it was unnecessary "to say any thing about them;" and this deponent further saith, that the said James made no objection to the quantity or quality of the money so tendered as aforesaid to the said James, and further this deponent saith not. Dated the 16th day of June 1806.

CHARLES LINDSEY.

Sworn the 17th day of June, 1806.
MATTHIAS B. TALMADGE.

Colden stated that he had in his hand subpœnas for the other witnesses who did not attend, with like proof of service on them. That the present application to the court, however, would only relate to Mr. Madison, Mr. Smith, Mr. Wagner, and Mr. Thornton. As to the three last the documents he had to offer, were *mutatis mutandis*, the same as those he had read relative to Mr. Madison; it would therefore be unnecessary to trouble the court with reading them; he should put them on file and the decision of the court on

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the documents that had been read he presumed would be allowed should govern in the other cases.

He trusted that the court would not order the trial to proceed until the defendant has had the compulsory process of the court, to bring up the witnesses who have disobeyed the subpœna. And that compulsory process, he presumed, must be an attachment for which, in behalf of the defendant, he now applied. He did not move for this process merely as a means of bringing in the witnesses to answer for their contempt in disobedience of the ordinary summons of the court; but he applied for it, as for that compulsory process which, by the constitution of the United States, every person accused was entitled to in order to bring in his witness to testify on his trial. (Here he read the 8th article of the amendments of the constitution of the United States.) He also read the 6th section of the act of congress of the 2d May, 1793, by which it is provided, that "Subpœnas for witnesses, who may be required to attend a circuit court of the "United States, in any district hereof, may run into any "other district."

Colden also read the 14th section, of the act of 24th September, 1789, which enacts, "that the courts of the United States shall have power to issue writs of *scire facias*, "*habeas corpus*, and all other writs not specially provided "for by statute which may be necessary for the exercise of "their respective jurisdictions, and agreeable to the principles and usages of law." This present application, said he, is sanctioned by the constitution, and the laws of our country. There can be no doubt of the power of the court to award the process, for which we apply, nor can there be any question of the justice or propriety of granting it. I will not suppose that there is any thing in the station of the gentlemen who are the subject of the present application, which exempts them from proceedings to which any other citizen would be liable. The court cannot, and I trust will not, recognize them in their official situations; but hear of them only as of men, who have disobeyed the process of the court, and whose attendance the defendant requires as witnesses. I shall not say more on this subject, because I cannot but persuade myself that the process we pray for will be granted as of course. But we have, in behalf of the defendant, a further petition to the court; which is that the process be made returnable at a short day, and that the court adjourn *de die in diem* until it may be served and returned.—The defendant cannot go to trial till his witnesses be brought

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in, and yet he is very unwilling that there should be any unnecessary postponement. The court cannot be ignorant that the defendant, by being removed from an office which was the support of a numerous family, and for which he had sacrificed all other business, has suffered, while his guilt is yet not proved, a punishment greater than any it is in the power of the court to inflict. The court must also know that while this prosecution is pending against him, it would be in vain for him to seek any new employment or means of life. The court will readily perceive that humanity, as well as justice, requires that the defendant should have not only the benefit of the testimony of his witnesses, but that he should have that benefit speedily. It is therefore, our humble petition to the court, in behalf of our client, that the process to bring in the witnesses may be made returnable at some short day, and that the court adjourn from time to time, till the return be made.

We shall forbear at present to urge any further arguments in support of the motion now before the court. When we have heard the counsel for the prosecution, we may have more to offer.

Sanford. The first question is, whether the application of the counsel for the defendant, for an attachment against the absent witnesses subpœnad in this cause on behalf of their client, is at this time regular? I contend it is not. We are not bound, at this time to discuss the question whether the attachments ought to issue or not. When the proper time, for the argument of that question shall arrive, we shall be prepared to meet them on that, as on every other question which may occur in the progress of the prosecution.

The court must have observed that the public prosecutor has, in the first instance, moved to bring on the trial of W. S. Smith; while this motion is depending before the court, nothing can be in order but a motion to postpone the trial; that question must precede the application for an attachment, the object of which is to punish the absent witnesses for a contempt. It may happen, that the parties are prepared to go to trial with the witnesses present; we are prepared on the part of the prosecution, and it does not follow that because persons who may have been regularly summoned as witnesses by the defendant are absent, the trial must be delayed even for a day, and still less until the return of the attachments shall be made.

I forbear to say a word at present on the application for an attachment, as a regular or legal mode of bringing in witnesses to testify. When that point shall come before the court, we

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shall be ready to meet and discuss it. We object to the motion for an attachment at present, simply on the ground that it is irregularly made at this time; and we shall not advance further in the argument, until the court shall have decided this point.

As therefore the application is altogether out of order, I trust the court will refuse it, and will order on the trial.

Colden, I do not see the difference in point of time as a matter of much importance. Whether the court decide on the one motion or the other first or last would be of little consequence. If the court order on the trial, then we shall renew our motion, and the court will certainly hear our application, and decide upon it before they allow the trial to proceed.

P. Edwards wished to be admitted to say a word in explanation. This prosecution must be at some time brought to trial, and why not now, after the delay already granted by the court? Certainly the defendant's counsel will not press a further delay, unless they show some good reason and legal ground for what they ask.

They say, that the witnesses subpœnad by the defendant do not appear. Well, is this a ground of delay? Will they be in a better condition if their witnesses are attached, and brought here to answer for a contempt of the process of this court? No such thing—the attachment they solicit, does not go to them *testificando*, to bring them in to give testimony, but merely to receive punishment for an alleged contempt.

The only motion they can make, is to put off the trial for some sufficient and legal cause; if they make that point, we are prepared to meet them; but surely the court will not put off the cause, in order to wait the return of an attachment, to be issued against Mr. Madison and the other gentlemen, who have been mentioned.

Hoffman. If the question is to take this shape, I am ready to meet it; but at present we hope the court will, at any rate, grant us a short delay for the absent witnesses to come in. It is the usual practice of the court, when the witnesses do not appear *instanter*, to postpone the trial for a day or more: this is what I should request, as it is probable that two of the witnesses may reach this city to-morrow. Far be it from me, to postpone this trial to a distant day: my only and sincere wish is, that it may come to issue before this court rises; but we anxiously hope that the court, from motives of justice and

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constitutional right, will grant us the compulsory process to bring in our witnesses, in the manner already requested. We do not dispute on matter of form; when our witnesses are here, the court will command their testimony, and it is with the court to enforce their attendance; but we shall certainly object to the trial proceeding at this moment.

Sanford. Do you mean to postpone the trial, on account of the absence of witnesses? If so, it might be cause of eternal delay.

Hoffman. Not so. I understand that two of the witnesses now absent, will be here to-morrow, and mention it as a sufficient reason for a day's postponement. But I do not mean to commit myself on the question, whether we are bound to proceed to trial in the absence of our witnesses, when we can show we have used due diligence. When that question is raised, I shall be willing to meet it, and if the witnesses should now come into court, I would cheerfully and confidently go to trial.

P. Edwards. The district attorney would repel with disdain, the idea of sheltering himself under forms. No, please your honors, he has with great liberality met the opposite counsel, and I feel myself impressed with its propriety. The objection to the mode of proceeding, on the part of the defendant, is founded in great solidity; but it is not proper, at this stage of the business, to disclose to our antagonists the grounds of our opinions. When the proceedings take their proper shape, we shall have no objection to indulge them in any proper information; till then they will not be answered on irrelevant matter; at present they ought to confine themselves to a motion for postponement, if postponement is their object. When that is decided by the court, we will proceed with them to discuss the motion for an attachment against the secretary of state, and other officers of the executive government of the union.

PATTERSON, J. informed the bar, that the court had received a letter from Messrs. Madison, Dearborne and R. Smith, informing that they would not be able to attend. The letter was in these words:

"*To the Honorable the Judges of the Circuit Court of the District of New-York.*

"We have been summoned to appear, on the 14th day of this month, before a special circuit court of the United

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States for the district of New-York, to testify on the part of William S. Smith and Samuel G. Ogden, severally, in certain issues of traverse between the United States and the said William S. Smith, and Samuel G. Ogden. Sensible of all the attention due to the writs of subpœna issued in these cases, it is with regret we have to state to the court, that the president of the United States, taking into view the state of our public affairs, has specially signified to us that our official duties cannot, consistently therewith, be at this juncture dispensed with. The court, we trust, will be pleased to accept this as a satisfactory explanation of our failure to give the personal attendance required. And as it must be uncertain whether, at any subsequent period, the absence of heads of departments, at such a distance from the scene of their official duties, may not equally happen to interfere with them, we respectfully submit, whether the object of the parties in this case may not be reconciled with public considerations by a commission issued, with the consent of their counsel and that of the district attorney of the United States, for the purpose of taking, in that mode, our respective testimonies.

We have the honor to be
With the greatest respect,
Your most obedient servants.

JAMES MADISON.
H. DEARBORNE.
R. SMITH.

City of Washington, 8th of July, 1806."

The court also mentioned that they had received a letter from Mr. Jacob Wagner, and one from Mr. William Thornton, which stated that they could not attend. That the letter from Mr. Wagner covered copies of a correspondence between him and Mr. Colden, by which it appeared that Mr. Wagner had offered to give his deposition in writing, if it could be taken by consent on interrogatories.

Colden acknowledged that he had received letters from the above mentioned gentlemen; and said that these letters had been submitted to the counsel concerned for the defendant who had agreed in opinion, that they could not, consistently with the interest of their client, dispense with the attendance of these witnesses, or consent to receive their testimony in the way it had been offered.—Nor did he think it possible that the court would suffer either the letter, which had been read from Mr. Madison

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and others, or those referred to by the court to have any influence in the decision of the question then before them. The letter from the heads of departments, written by order of the president, was an attempt of the executive, to interfere with the judiciary, which no doubt the court would indignantly repel.

PATTERSON, J. The court mentioned these letters, to show that the gentlemen who had signed them, would not be here upon the subpœnas, and were particularly called forth by what had fallen from one of the defendant's counsel, that two of the witnesses would probably be here to-morrow.

TALMADGE, J. Those letters are not to determine how the court shall act; their decision must be formed upon other ground. They were mentioned as I conceive, with the view of convincing the counsel that none of the gentlemen who have signed them will be here to-morrow.

PATTERSON, J. said that was the idea he meant to express.

Colden. Our application to the court for an attachment, the district attorney says is superseded by his motion to bring on the trial. I do not mean to enter on an argument on this point: but let me inform him that he misconceives us in this particular. We apply for the attachments not merely to bring in the witnesses to answer for their contempt, but that they may be brought here to testify. We have no partiality for *this* or *that* process, nor care whether the process the court grants to us be called an attachment or any thing else, so that it be that compulsory process which the constitution and laws give us a right to demand.

Sanford. The court will please to dispose of the question as to a day's delay for the witnesses, whose attendance is expected to-morrow; but as to the question of attachment it is altogether different. We have moved to bring on the trial; to defeat this motion, the defendant must show that the absent witnesses are material for his defence in the present cause: and I would ask how can he possibly show this when the gentlemen, whose testimony is required, were all at Washington, when the military expedition was set on foot, and preparing at New-York. What possible knowledge of their own could they have of those transactions at the distance of 250 miles. No affidavit in common form, stating the materiality of the witnesses, can be admitted; they must show the

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special grounds on which their testimony can operate for the defendant; and when this shall be done, the court will judge whether the special matter which may be disclosed constitutes a sufficient reason for postponing the trial.

P. Edwards concurred in the position of the district attorney, and required of the defendant to show the special ground for the application, wherein the testimony of the absent gentlemen was material to his defence.

Colden. That is not the law, as we have hitherto understood it. If we are obliged to offer an affidavit, we conceive it to be sufficient in the first instance, to declare generally, that the witnesses are material without specifying the particular points to which they are to testify, and that without them our client cannot safely proceed to trial.

PATTERSON, J. You must offer an affidavit, and must show in what respect the witnesses are material. The facts charged in the indictment took place, and are laid in New-York; the witnesses are admitted to have been during that period at Washington. The presumption is therefore that they cannot be material, and this presumption must be removed by affidavit.

Colden, after a short silence, during which the counsel on both sides had conferred together, addressed the court. The counsel have agreed among themselves, that the cause shall go off till to-morrow. To which the counsel for the prosecution having signified their assent, *Colden* then said, the trial being disposed of for the present, I now move on the documents which have been read, that an attachment be issued against Mr. Madison.

Sanford. We have by no means waived the priority of our motion that the trial may proceed, by consenting to postpone the cause till to-morrow. When the court shall have decided that, the motion for an attachment is in order, and we shall be ready to argue it; but the court will not permit our first question to be superseded by the deference we have paid to their request.

Washington Morton said the counsel for the defendant had no objection to this question also going off till to-morrow, and then arguing them together.

Colden. If the court would grant us the attachment to day, it would be a gain of so much time, as the trial is postponed till to-morrow.

TALMADGE, J. The questions of bringing on the trial, and of the attachment, are certainly distinct, but setting the first aside for the moment does not authorise the other to assume its place. You cannot have your motion for the

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attachment argued before it is determined whether the trial shall now proceed.

Colden. It has been agreed to postpone the trial: the district attorney's motion then being disposed of, nothing now interferes with our motion for the attachment.

PATTERSON, J. The conversation is extremely desultory, but go on in your own way.

Colden. I am now ready to open the argument at large, on the motion for an attachment, if the court will please to hear me. But if we now agree to postpone this argument till to-morrow, as we have the preference now, we trust the court will grant it to us then, and hear us before the motion to bring on the trial is renewed.

PATTERSON, J. Certainly not.

Harison. Then I presume we are to give up the idea of arguing the motion for the attachment at present, as the trial is postponed by accommodation.

TALMADGE, J. The accommodation has been granted, for the purpose of giving time for the arrival of some absent witnesses; this throws the trial off for a day, but it cannot give to the defendant's counsel, the privilege of having the second motion argued until the first is determined; the first question still retains its priority.

P. Edwards. When the attachment is argued, we shall not take the ground of privilege for the executive officers of the government. I know the district attorney would disdain to rest himself on such a pretext. We shall require of the defendant to show that they are material witnesses, by affidavit and proof; if they cannot make out this point, their application fails. We have suffered the trial to go off for to-day; perhaps the other motion ought likewise to be suspended, especially if the defendant has not prepared his affidavit, on which the motion must be bottomed.

Emmet. Have the court decided that the motion for the attachment, should not be heard in preference to the question which has been postponed till to-morrow? If they have not, I would ask permission to suggest one circumstance, why it should have the precedence. The right of the defendant to compulsory process to bring in his witnesses, is not only guaranteed by the constitution and the laws, but springs from the necessity of the furtherance and due administration of justice, in all well regulated governments, and if we can obtain the attachment to day it will certainly expedite the trial.

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P. Edwards, interrupting, said, the court, he presumed, intended to accommodate the counsel on both sides, with the postponement of both questions till to-morrow.

Sanford, understood that the court had already decided on that point, by declaring that the public prosecutor, should not lose the precedence of his motion, to bring on the trial by the delay which had been accommodated, and he insisted upon the point of order.

Emmet, did not imagine the court had decided against hearing the argument in favour of the motion for an attachment. He understood the trial was not to be brought on *instanter*, but certainly that was not to postpone the right of the defendant, to have his motion allowed.

[At this moment the grand jury came into court, and the foreman informing the court they had found no bills, and the district attorney declaring he had nothing to lay before them; they were discharged for the present.]

Emmet consented to the accommodation on the condition that it do not operate to the injury of his client, and proposed to offer an affidavit, proving the absent witnesses to be material on the trial. He hoped it would be understood that the trial was to be put off from day to day, until the witnesses came in.

PATTERSON, J. The first motion will have the priority in the decision, but if the counsel agree they may argue the latter proposition first.

Sanford. We pray the decision of the court as to the mode of proceeding.

PATTERSON, J. I am willing to hear the arguments on both points, and I do not care which is argued first, but I do not mean to decide either until both are gone through.

TALMADGE, J. The first motion will have the first decision.

PATTERSON. J. You make all the difficulty out of a mere matter of form. If you argue the motion for an attachment to-day, no opinion will be given until the court have decided upon the motion for bringing on the trial. Let them go hand in hand, and the court will take care that neither party shall be caught or entangled in the net of form.

It was then agreed by the counsel on both sides, that the two questions should be argued together to-morrow.

Adjourned, till ten o'clock to-morrow.

Tuesday, July 15th 1806.—Present Judges PATTERSON and TALMADGE.

Colden made a brief recapitulation of the course of

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proceedings of yesterday, and then offered the following affidavit of Wm. S. Smith :—viz.

New-York, *ss.* William S. Smith, the defendant in the above cause, being duly sworn, says, that James Madison, of the city of Washington, Robert Smith, of the same place, Jacob Wagner, of the same place, and William Thornton, of the same place, are material witnesses for him the deponent, on the trial of this indictment, as this deponent is advised by his counsel, and verily believes to be true, and that he cannot safely proceed to trial of the said indictment without the testimony of the said James Madison, Robert Smith, Jacob Wagner, and William Thornton, and that they have been regularly subpœnad to attend at this court, on the fourteenth day of July instant, to testify in behalf of this deponent, on the said trial, and have not appeared in the said subpœnas, nor hath either of them appeared; and this deponent further saith, that he hopes and expects to be able to prove by the testimony of the said witnesses that the expedition and enterprise to which the said indictment relates, was begun, prepared and set on foot with the knowledge and approbation of the president of the United States, and with the knowledge and approbation of the secretary of state of the United States; and the deponent further saith, that he hopes and expects to be able to prove by the testimony of the said witnesses, that if he had any concern in the said expedition and enterprise, it was with the approbation of the president of the United States, and the said secretary of state; and the deponent further saith, that he is informed and doth verily believe, and hopes, and expects to be able to prove by the testimony of the said witnesses, that the prosecution against him for the said offences, charged in the said indictment, was commenced and prosecuted by order of the president of the United States; and the deponent further saith, that he has been informed, and doth verily believe, that the said James Madison, and Robert Smith are prevented from attending by the orders or interpositions of the president of the United States—and further this deponent saith not.

(Signed) W. S. SMITH.

Colden proceeded. The present application is to put off the cause on account of the absence of witnesses whose testimony the defendant alleges is material for his defence, and who have disobeyed the ordinary process of the court. In compliance with the intimation from the bench yesterday, the defendant has disclosed, by the affida-

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vit which I have just read, the points to which he expects the witnesses who have been summoned will testify.

If the court cannot, or will not issue compulsory process to bring in the witnesses who are the objects of this application, then the cause will not be postponed.

Or if it appears to the court that the matter disclosed by the affidavit might not be given in evidence if the witnesses were now here, then we cannot expect that our motion will be successful. For it would be absurd to suppose that the court will postpone the trial on account of the absence of witnesses whom they cannot compel to appear; and of whose voluntary attendance there is too much reason to despair; or on account of the absence of witnesses who, if they were before the court, could not be heard on the trial.

It is therefore my business to show that the court can issue compulsory process against those persons who have disregarded the subpœnas. And secondly, that this process ought to issue because their testimony, as it is disclosed by the affidavit, would be material.

If the witnesses who have been summoned stand on the same level with their fellow-citizens; if there be not something in their high offices to raise them above those laws which are above the rest of the community; then there can be no doubt but that they are subject to that provision of the constitution, which in its terms seems to pay no respect to official dignity or station; but, as it appears to me, gives the accused a right to demand compulsory process against any man whose testimony he may deem necessary to make his innocence appear. I shall not, however, enlarge on the powers of the court in ordinary cases, to issue the process for which we now apply. I shall be content to repose on the articles of the constitution and the laws of the United States to which I referred yesterday.

I proceed to inquire whether Mr. Madison and the other heads of departments have offered a sufficient excuse for their disobedience to the process of the court, by saying they are members of the executive government—whether these dignified sounds elevate them above the constitution and laws.

The general rule is that all persons are bound to give testimony. I have no book from which to read this rule; but I think it is written by the finger of God on the heart of every man. True it is that the necessities of society have introduced one exception, and but one: and that is where a person in the capacity of counsellor or attorney, repre-

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sents another. This exception is most strictly confined to this relationship. No obligations of secresy or confidence however sacred; no connections of blood or ties of friendship can interpose in the administration of justice: If they could, a *Russel* would not have perished by the hands of the executioner, or England have been indelibly stained with the blood of a *Sidney*. In the case of the dutchess of Kingston (11 State Trials, 246.) for bigamy, sir Cæsar Hawkins was called to prove that he had delivered the dutchess of a child. He attempted to excuse himself from giving testimony on the ground of professional confidence; but the court wrung from him his secret. And in the same case lord Barrington in vain implored to be excused from giving testimony against the accused, as all he knew had been imparted to him in the confidence of friendship. A Roman Catholic priest has been compelled to disclose the communications of his penitent in his religious capacity of confessor. (2 Atk. 524.)

I do not expect to hear the counsel for the prosecution contend after this, that any obligations of confidence interpose to shield the defaulting witnesses from the process which in the name of the constitution we demand. Nor will I suppose that the learned counsel who are opposed to us mean to say that there is any thing in the official dignity with which the witnesses are clothed which saves them from the operation of the laws. The peers of England have not thought that their titles or stations afforded them any such exemption. And even the king of that country, who claims his title by divine right, has yielded to the obvious moral obligation of giving his testimony when the administration of justice rendered it necessary. (1 Salk. 278. 2 Hawk. 152. Hob. 213.) Indeed, if it were necessary to produce authorities on this point, we might go very far back and show that the kings of Judea have witnessed and been witnessed against. Seld. 1521, 1526. Wilk. edition.

But it may be said that there are certain political motives which should induce the court to excuse the secretary of state and other heads of departments from giving testimony. That were they to be examined as witnesses they might disclose state secrets!

If I were to admit that there are certain secrets between the president and his secretaries which they would not wish to disclose, (and I have no doubt there are many such) or which ought not to be disclosed; still the witnesses who have been duly summoned owe obedience to the process of

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the court; they must appear and be sworn, and when on their oaths, they may avail themselves of this excuse if questions are put to them which they ought not to answer. But the court must judge and not the witnesses, whether they shall or shall not answer. Much less shall the witnesses be allowed to determine for themselves whether they will be obedient to a mandate of the judicial authority.—Such was the determination of the supreme court of the United States in the case of Maubry against Madison. Cranch's Reports, 137.

But the dreadful inconvenience to the gentlemen themselves and the injury to our national affairs, that may result from the court's exercising a power to call on our great men as witnesses, has been suggested. In the case I have mentioned of Maubry against Madison, Mr. Lincoln took precisely these grounds. Yet in that case the court would not grant him a moment's time to consider whether he would or would not be sworn, although they had no objection that he should have time to consider what he would or ought to answer.

Before I quit this point I will pray leave to refer the court to one other case which has occurred in our own courts: I mean the case of the United States against Thomas Cooper. And although I should be sorry to find that case received as law in all its points, because I think there are in it some determinations against the defendant too severe and rigorous; yet it will shew that the question under consideration is not a novel one. Mr. Cooper calls as witnesses several members of the national legislature and officers of the executive government—Judge Chase permits subpoenas to issue against them—Judge Peters indeed objects to the members of the legislature being subpoenad on account of a supposed privilege attached to them as members of the congress then in session, and therefore he thought the process could not be enforced and that the court ought not to issue a process to which they could not compel obedience. But an objection on account of official station or dignity, or on account of executive confidence is not even thought of: Such extraordinary objections are reserved for this very extraordinary prosecution. In the event, Mr. Cooper's witnesses appeared in court and offered to be examined.

If, however, the exemption in the present case should be supposed to extend to the heads of departments, I presume it will not be contended that it extends likewise to Messrs. Thornton and Wagner, who are admitted to be only clerks

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in the offices. If one clerk is entitled to this privilege, so is every other, on the ground of being an executive agent. Suppose a case of treason or murder: would the court admit of such an apology for refusing to the person indicted compulsory process? It is monstrous to suppose that they would. Why then should it be refused to us in the present case; is the punishment to which the defendant is obnoxious of so trifling a nature, as to render his conviction or acquittal a matter of indifference? No, sirs, the defendant is exposed to punishment extremely severe; he is subjected to a penalty of great amount, and to imprisonment in the common Bridewell, among the vilest felons who are separated from the community. Shall he be exposed to all this, deprived of that shield which will cover him from this ungenerous attack; for the testimony we have sought and which the court can furnish will be to us that shield of defence.

Will it be admitted as an excuse that the gentlemen cannot attend at this time because the affairs of the nation rest upon their shoulders? But it is intimated in their letter, that their official employments will always interfere whenever the defendant may require them as witnesses: in that case we cannot issue an attachment either now or hereafter. Yet it is no uncommon thing to find these gentlemen absenting themselves from the seat of government for months at a time, for their own pleasure or business. It is hard indeed that they cannot devote a few days to the fate of a fellow-citizen.

I humbly hope that I have satisfied the court that they have power to issue the process we pray for, and that no sufficient excuse has been or can be offered for disobeying the subpœnas, and that therefore the attachment ought to be granted; if not for the purpose of bringing in the witnesses to testify, which is now our object, at least I think the court will be of opinion that they ought to compel the witnesses to appear and answer the contempt.

I now proceed to inquire whether the testimony which we expect to obtain from these witnesses may not be given in evidence, when the defendant is on his trial.

And here we say it may be given in evidence either in mitigation of the punishment, or as a justification. If not as a justification, certainly we shall be allowed to offer it in mitigation; and the proper time to offer it in mitigation is on the trial. There is no doubt but that circumstances in mitigation may be offered to the court after the verdict.

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If a defendant is so fortunate as to be able to obtain such testimony after he has been pronounced guilty by the jury, the court will undoubtedly listen to it. But the laws do not put it in the power of a defendant to compel a witness to appear and testify in his behalf unless it be on the trial of the issue.

It is as much the right of the accused to lay before the court testimony which may tend to lighten his punishment, as it is to offer testimony that will entirely exculpate him. Is it not as unjust and unreasonable that a defendant should be subject to three years imprisonment when he can show that he ought not to suffer three days confinement, as it is that he should be convicted when he is not guilty? If, therefore, there is no other mode of obtaining the mitigatory testimony but by the witness appearing upon the trial, the court will oblige him then to appear. Let us ask, has the law provided any means by which the defendant can compel a witness to give an extra judicial deposition in any criminal case; or is there any process by which the defendant can compel a witness to appear in court after the trial? We answer with confidence that there is none. Such a thing has never been heard of, and the counsel for the prosecution, we are certain, cannot point out to us any means by which we may oblige a witness to give the testimony we expect, if the court should say they would hear it after the trial. It is true, indeed, where witnesses have voluntarily made affidavits of this nature, the courts have received them after the issue has been decided. But can a matter of this importance to the accused depend on the mere will and pleasure of another? Every notion of justice is opposed to such an idea. And if there be no certain mode of obtaining this testimony but by examination of the witness on the trial, the court will oblige him to appear. We are, however, not without authority on this subject. In the case of the earl of Anglesea, indicted for a misdemeanour, reported in 9 state trials, 305. it was expressly decided that circumstances in aggravation of the defendant's offence might be given in evidence on the trial. Now, if circumstances in aggravation may be offered on the trial of the issue, *a fortiori* it must be lawful to give in evidence circumstances of mitigation. For, as it is better that a guilty person should escape punishment rather than that an innocent one should suffer unmeritedly; so it is better that a guilty defendant should escape with too light a punishment rather than that he should suffer more than he deserves. This case of the

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earl of Anglesea is a very strong one in our favour: the point now before the court was there debated and received a decision which supports the principles for which we now contend. So in many instances have the courts allowed a defendant to give evidence of character, where the character of the defendant could have nothing to do with his guilt or innocence: M'Nally, 320, 323, &c. But we may appeal to universal practice on this subject. Is there a lawyer who hears me that will say he ever knew testimony of this kind refused by a court on a trial? and is it not admitted every day? I hope, therefore, the court will say that although we may only offer this testimony in mitigation; yet the witnesses must be compelled to come here and give us the benefit of it.

We, however, go farther, and offer this testimony not merely as mitigatory, but as relevant to the issue, and as a complete justification of the acts with which the defendant is charged. We say by the affidavit that the witnesses will prove that what the defendant did, he did with the knowledge, consent and approbation of the president of the United States: and if they do prove this the defendant must be acquitted.

Let us suppose that we could prove that the acts charged against the defendant, were done by the express order of the president of the United States; would not such an order be a complete justification? That the president might have authority to give such an order, cannot be questioned. Congress have the power of declaring war; and when that is done the president is to act under it, and may authorise any military or hostile measures against the enemy. If it be said that there was no declaration by congress, it is sufficient for us to answer that there might have been. The constitution does not require that a declaration of war should be made public; it would be absurd to suppose that it did, and that thereby the executive of this country was to be deprived of all chance of taking an enemy by surprise, or of the advantages of secret measures of defence or offence. It is well known, that at the time general Miranda's expedition was set on foot, congress were sitting with closed doors, and might have, nay, it was universally believed that they had, declared war against Spain. If they had done so, the president would have had constitutional authority to sanction the acts for which the defendant is now to answer; and will it be said that the individual acting under the order or sanction of the chief magistrate of the country, who might have had authority to give that

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sanction shall be answerable criminally for what he has done pursuant to that order. Must he inquire whether the chief magistrate was or was not authorised to give the order, and must the defendant be punished if it turns out that the president has acted illegally. No; it would be an oppressive and tyrannical doctrine to say the defendant may be charged with a crime under such circumstances. The defendant had only to inquire whether the president gave him an order which might be within the scope and limits of his constitutional functions, and if it was so, the defendant cannot be punished for his obedience. I will not take up the time of the Court longer on this part of the subject, or detain it with any argument to show that when we have proved that the defendant acted with the knowledge, consent, and approbation of the president of the United States, it must be equivalent to proving that he acted under an express order.

But let us suppose that the testimony we offer would not make out a justification according to the strict legal acceptation of that term, still we say it would form such an excuse for the defendant as would entitle him to a verdict of acquittal.

If the defendant can satisfy the jury by the testimony of the witnesses whom he now calls, that he had no intention to disobey the laws, but on the contrary that he thought, and had reason to think, that his conduct was sanctioned by their authority; and that he would merit the approbation of his government, and the applause of his countrymen, he will not, he ought not to be convicted.

Where there is no intent to do wrong, there can be no crime. This is a principle not derived to us from tradition or record; it is in the heart of every man, is imbibed with our reason, and cannot be obliterated while a sense of justice, or knowledge of right and wrong is retained.

I expect to hear it said, that if this principle be applicable to all cases, then an ignorance of the law will always be an excuse for an offence. Sir, I say it will be so whenever a defendant may have it in his power, clearly to demonstrate that he was ignorant. As if a law should this day be passed at Washington, against the exportation of arms, and a person to-morrow, before he could possibly have knowledge of the existence of such a law, should make a shipment contrary to the prohibition. I say no jury on earth would convict a defendant under such circumstances. No court on earth would tell a jury, that in such a case, they ought to convict. But as it may, in many cases, be impossible to prove on a defendant a knowledge of the law, he is very wisely charged with it. In the first instance it is always

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to be presumed that every citizen is acquainted with the laws of his country, and that presumption must stand against him till it is destroyed by decisive and irrefragable proofs.

And so it is also with respect to the intent. If an offence is committed against the laws, it is to be presumed that there was an intent to offend until the contrary appear. But when that does appear, the presumption is destroyed, and the accused is exculpated. The testimony we would offer, may then be heard if only for this purpose, if only to take away that presumption of criminal intent, which the law very wisely and necessarily raises against the defendant.

But whether this testimony may be a justification or excuse, it ought to be submitted to the jury. They are the judges of the law, and the fact. And all the facts ought to be brought before them, that they may apply the law. I do not mean by this that a party is to be at liberty to offer any sort of testimony that he may please, but he has an unquestionable right to submit to the jury every fact that has any relation to the crime with which he is charged.

There is another ground, also, on which the jury ought to be permitted to hear this testimony. It has become a practice for jurors to recommend a convict to the mercy of the court, where they think he deserves it. This practice is sanctioned by so many instances, and by such a length of time, that it may now be considered as a right, and if it be so, then certainly the jury ought to have every circumstance before them, which will assist them to determine whether they will recommend or not.

It may be proper, in order that the court may see the full applicability of the testimony we expect from the witnesses who have been subpœnad, that I should mention the other testimony that we expect to offer in connection with it. We shall show from the journals of congress, when their secret sessions began, and how long it continued. We shall prove that it was universally believed that congress had secretly passed an act for going to war with Spain. We shall read the president's message at the opening of the last congress, and a variety of documents communicated by him, on the sixth of December.* And we shall then, from proving the notoriety of the preparations for general Miranda's expedition as well here as at Washington, and by a variety of other circumstantial testimony, bring home to the president the knowledge we impute to him.

Thus, may it please the court, I have endeavoured to establish the power of the court to issue the process for which

* See Appendix.

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we ask, and to show that the gentlemen who have been subpœnad, are not exempt from their process, on account of their official dignity, or excused from obeying the subpœnas, on the ground of their being confidential executive agents. I have attempted to show that the testimony which these witnesses would afford us, would be material either in mitigation or exculpation, and that in either case it must be given in evidence on the trial. I too plainly perceive how much I have left undone. But it is my province only to open this argument.

I am happy that I am to be followed by counsel who will not fail to supply my omissions.

Hoffman. If I am not precluded, by the intimation of the court yesterday, that it was necessary to disclose, by affidavit, the facts intended to be established by the absent witnesses, I solicit permission to submit some remarks, tending to show that the general affidavit ought to be received as sufficient, for the postponement of the trial. With all possible respect, I suggest, that the defendant's counsel were not heard on this question, and I hope I may consider the intimation not as a fixed or deliberate opinion of the court.

PATTERSON, J. You are too late. The question is already decided.

Hoffman. I proceed then to add to the opening argument, and shall limit my observations chiefly to the materiality of the testimony; for as it respects the right to an attachment, the principles on which we rely have been fully and ably stated. I, however, beg leave to read an additional authority, in support of the general scope of the argument used by my associate counsel.

In 1 M'Nally's Rules of Evidence, 255, it is decided, "that the claim of exemption from giving evidence, is "scrutinized with a jealous eye, and the person relyin gon "it, must establish his right by showing a positive law, "or express authority." The master of the rolls, Sir Michael Smith, adds, "it was the undoubted legal constitu- "tional right of every subject of the realm, who has a "cause depending, to call upon a fellow subject to testify "what he may know of the matters in issue. And every "man is bound to make the discovery, unless specially "exempted and protected by law."

The general proposition, which I shall endeavour to maintain, is, that the testimony of Mr. Madison and the other witnesses named in the affidavit, is material to Col.

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Smith, in his defence of the present prosecution. It is material, as matter of excuse or justification; but if not strictly as matter of justification, then as evidence to inform the judgment of the court, in the exercise of its discretion, in inflicting the punishment. Before I enlarge on these points, I remark, that it is sufficient for our purpose, to suppose a state of things between this country and Spain, where the assent and approbation of the executive of the United States, would justify the expedition charged in the indictment; for if there can be such a case, the advice of the counsel, as stated in the affidavit, must be presumed to apply thereto; unless, therefore, it shall appear *negatively* to the court, that the prosecution or defence can assume no shape, where the testimony required will be important, they will not refuse to postpone the trial. It certainly is not necessary for the defendant to disclose by affidavit, the precise use intended to be made of the evidence. We are not bound to unfold our entire defence to the public prosecutor; we are only bound to lay enough before the court, from which the importance of the testimony may be inferred.

The offence charged in the indictment, is, for beginning and setting on foot, preparing and providing the means for a military expedition against a nation, with whom the United States are at peace. And it may be asked, can the United States be in a state of war with a foreign nation, until congress shall have formally declared war? Congress have alone the constitutional right, to *elect* to go to war; but, in case of an actual war declared or waged by a foreign power, there is no option, war does already exist; a defensive war, without the agency of congress; a war *de facto*, and which would take the case out of the statute. Put the case of actual war commenced by Spain, against the United States, when war has not been declared by congress; would it not be permitted to the president, to call out the military forces of the union, to repel the aggression? Certainly it would. An attack may be made here at the city of New-York; may not the president commence and execute offensive operations, to draw off the enemy from this port, and put them on their defence in Florida, or any other part of the Spanish dominions? Offensive war once begun, the nation attacked succeeds to all the rights of legitimate warfare. It may merely resist its enemy, or it may repel its aggressions by a stroke, at the head, the heart, or the extremities. All are equally justifiable.

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Suppose, in the progress of this cause, we should be able to verify the language of the president in his message on the subject of a war with Spain, when he speaks of force being to be met by force; and that we should show the conflict had already commenced, in which we were trying "who could do the other most harm," would not this be actual war?

I ask, whether a war has not existed between this country and other nations, without a declaration of war by Congress. Whether it did not exist against Tripoli and other African states, without such declaration? Do I mistake the fact, when I say, that an expedition was fitted out against Tripoli? And will it be denied, that we were *then* in a state of actual war? Yet congress had declared no war. Was the president of the United States justifiable for this act of hostility, commenced without the authority of congress? Certainly he was. It can never be denied to the executive to resist an attack. He is constitutionally bound to defend the United States against all foreign attacks as well as domestic insurrections, and in the way best calculated in his judgment to insure success. A law was afterwards passed by congress, providing the ways and means of carrying on the war, then existing, and so existing, and let it be remarked, continuing to exist, without any positive or formal declaration by congress.

If war then can exist between the United States and a foreign nation, without a declaration of war by congress, it belongs to the executive of the union, to ascertain the fact, and to declare the condition of the nation—to say if actual war exists or not. The constitution delegates to the executive, the power to protect and preserve the peace of the United States—to communicate with foreign nations—and he is the constitutional organ through which the people derive their knowledge of our political relations with foreign powers.

Mr. *Hoffman* then urged, that the assent and approbation of the president of the United States, to the expedition charged in the indictment, was strong evidence that Spain was not at peace with the United States; as it was not to be presumed, that the president would have violated his trust by authorising the expedition. At any rate, that he was in the execution of a right constitutionally vested in him—that he alone was responsible; and the individual, who acted in conformity to his permission, had committed no offence.

[These topics were again urged by Mr. H. in his address to the jury; the reporter therefore omits to insert them in this part of the trial.]

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Mr. *Hoffman* then proceeded to the second branch of his argument.

Waiving all further discussion on the first point, I shall endeavour to fortify the argument, that the defendant is entitled to have the witnesses examined, and to submit his whole case to the court and jury, for the purpose of mitigating the punishment. The constitution of the United States secures to the accused the right to have compulsory process for his witnesses. This privilege is hardly worth the enjoyment, if it is to be confined to the case of a complete acquittal of the charges in an indictment. Col. Smith may be technically guilty, and yet his offence of so small a grade, as hardly to merit more than a nominal punishment.

It is conceded, that after the trial, this court has no power to enforce the attendance of the witnesses, and the constitution does not extend its benevolent provisions to my client, unless he is permitted on the trial to prove the extent and nature of his offence.

The correct principle is laid down in M'Nally, already cited, "that wherever the punishment is discretionary, the testimony is to be received, although it only applies for the purposes of mitigation." I think I may, without fear of contradiction, assert that there is no authority to the contrary; and I speak with confidence that such has been the practice in the courts of this state. While I had the honour of holding the office of attorney-general, the objection was never made; and I understand, that the practice of my predecessors always corresponded with my own.

Let us examine the question upon the strength of authority. Besides the case already mentioned from M'Nally, there has been read to the court the case of the earl of Anglesea; to which, I presume, will be opposed the case of the chevalier D'Eon, in 3 Burrows, 1513. The case is shortly thus: An information was filed against the chevalier D'Eon, for a libel on the count De Guerchy. M. D'Eon moved to postpone the trial on account of the absence of material witnesses. It appeared that the witnesses resided in France, and were there at the time of printing and publishing the libel, and that they were in the service of the crown of France; and that there was no probability of their being sent over, or even permitted to come over, to give evidence on behalf of D'Eon.

It is to be observed, that their attendance could never be enforced, nor could they be compelled to give evidence in any stage of the prosecution. Their attendance and their evidence would be altogether voluntary, and no possible injustice could be done to the defendant by refusing to postpone

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the trial; for it would be useless to delay it, in expectation of obtaining the testimony. Lord Mansfield proceeds to say, "if their knowledge relates to any circumstance that may serve to mitigate the punishment, in case the defendant should be convicted, *that* sort of evidence will not come too late after conviction of the offence, and *may* be laid before the court by affidavits."

Lord Mansfield by no means decides, that the evidence could not be received on the trial: He only says, it will not come too late, after conviction.

The chevalier D'Eon was not deprived of any benefit, by the course adopted by the court on that occasion, for as they could not aid him by any process that could be awarded, they leave him in the same situation as if the trial was not postponed—*to his ability to obtain voluntary affidavits.* Not so here; this court can enforce the attendance of the witnesses at the trial, and at *no other time.* If the testimony is not then received, the defendant must forego it; for, after trial no compulsory process can issue; and, strange as it may seem, the defendant has a right secured to him by the constitution, which he cannot enjoy, if the court refuse to interpose its authority, and compel the attendance of the witnesses at the trial. The case of D'Eon therefore, fairly considered, is in principle with us.

The question appears to be reduced to this single point:—the testimony we seek is material to the defendant in this cause. The court can now give him the benefit of it; if they do not, he may be presented for punishment as an offender whose guilt is of the deepest dye. And is it not material to the cause of the defendant, that the extent of his offence should be known? Is it not material to his personal liberty, to his interest and to his character, that the punishment should bear a just proportion to the offence? The discretion granted to the court by the statute, is useless, if the defendant is deprived of the means of shewing circumstances, evincive of his innocent intentions, and justly demanding the utmost lenity of the court.

This subject is before the court in a way extremely inauspicious to the honour of the government of the United States. The president of the United States approving the act which he now seeks to punish—his approbation no doubt proceeded from honourable motives—from enlarged views of the true policy and dignity of our country. It deserved praise. But if he did order this prosecution, it is not for me to justify or excuse the perfidy. Let it too be remembered, that in the case of D'Eon, lord Mansfield says, "if the witnesses

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had been sent away by the person on whose account the prosecution is carried on, *that* indeed would have been a sufficient ground for putting off the trial until they could be had. But here, says his lordship, is no pretence for such an insinuation."

Are we not expressly within this principle? The president of the United States ordering the prosecution—and the president of the United States restraining the witnesses from attending.

To conclude—The justice of our present application must be evident, and unless there exists some stubborn and unbending rule of law to the contrary, I indulge a strong hope, that the court will postpone the trial, compel obedience to its process, and thereby become possessed of the whole truth. If so, my client has no dread of punishment: It may be nominal—it cannot be severe.

PATERSON, J. expressed some regret that it was not in the power of the parties to carry the present motion up to the supreme court for its opinion, which could only be done in consequence of a difference in opinion between the two judges sitting in the circuit court, as expressly declared by the law.

Mr. *Sanford* read an affidavit, as follows:—

District of New-York, to wit. Nathan Sanford being duly sworn, deposes and says, that the offences laid in the indictments in these causes, took place in the city of New-York between the twenty-fifth day of December last, and the first day of February last; that the facts which will be given in evidence on the part of the prosecution, upon the trial of the said indictments, took place in the state of New-York, and principally in the city of New-York, during that period; that during the whole of that period, James Madison, Robert Smith, Jacob Wagner, and William Thornton, were, as this deponent has been informed and really believes, at the city of Washington, and not in the state of New-York; and that, as this deponent has been informed and really believes, the said James Madison, Robert Smith, Jacob Wagner, and William Thornton, have not, nor has either of them, any personal knowledge of the offences charged in the said indictments, or of the facts which will be given in evidence, upon the trial of the same on the part of the United States—and further this deponent says not.

NATHAN SANFORD.

Mr. *Sanford* proceeded to say that the facts stated in this affidavit were not at variance with those stated in the affidavit offered by the defendant.

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Sanford. If I understand the questions now before the court, they are these:—First, whether the trial shall be postponed until the defendant's witnesses, who are now absent, shall come in—and, second, whether attachments shall issue against the four witnesses who have not attended upon the subpœnas.

It was decided by the court yesterday, that it was incumbent upon the defendant, in order to entitle himself to a postponement of the trial, on account of the absence of these witnesses, to shew in what respect they are material for his defence. It was the opinion of the court that the general affidavit in common form would not be sufficient for this purpose; but that the particular facts expected from the witnesses must be disclosed, in order that the court might, upon those facts, judge of the propriety of granting the postponement. In compliance with this decision, the defendant has now made an affidavit, in which he has stated the particular facts which he expects to establish by those witnesses. The matters stated in this affidavit must, at present, be taken to be true, and, for the purposes of this motion, it must be supposed that the witnesses are really able to prove the facts stated. The point of inquiry therefore, is, whether the matters stated in the affidavit of the defendant, are material in point of law, to his defence, upon the trial of this indictment.

The principal allegation of the defendant in his affidavit, is, that the military expedition against Carracas, and his agency in it, took place with the knowledge and approbation of the president, and the secretary of state. It is said by his counsel, that this amounts to a complete justification of the offence, or that at least, it must operate in mitigation of punishment; and, that in either view, they are entitled to the testimony. This we altogether deny. It can neither operate in justification or in mitigation. The most superficial attention to our constitution and form of government will be sufficient to convince any one that this sort of defence is wholly inadmissible. It proceeds altogether upon the idea that the executive may dispense with the laws at pleasure; a supposition as false in theory as it would be dangerous and destructive to the constitution in practice.

The defendant is indicted for a breach of a positive statute of the United States. Do his counsel seriously contend that the president dispensed with the law in this instance? Where will they find an authority of this nature vested in the president? For unless they shew this, they gain nothing by their argument. Among the powers and duties of the president, declared by the constitution, he is expressly required, "to

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take care that the laws be faithfully executed." They will not venture to contend that this clause gives the president the right of dispensing with the laws. Does the president derive such a power from his legislative character? Certainly not. He has a qualified *veto*, before the law passes. If he approves a bill, he shall sign it; but if not, he shall return it, with his objections, and the bill may be passed into a law, without his consent. When it has become a law, according to the forms of the constitution, it is his duty to take care that it be faithfully executed. He cannot suspend its operation, dispense with its application, or prevent its effect, otherwise than by the exercise of his constitutional power of pardoning, after conviction. If he could do so, he could repeal the law, and would thus invade the province assigned to the legislature, and become paramount to the other branches of the government. To repeal a law, is an exertion of the same legislative power as to make a law; and the legislative power, for whatever purpose exerted, can only be exercised by the whole legislature. The president has no legislative power whatever, except in approving or disapproving bills, which have been adopted by a majority of both houses of congress.

These principles result from the constitution, or rather, they are found in the constitution itself. The constitution of the United States is a delegation of limited powers.—The powers delegated are not only defined with accuracy, but are with equal caution allotted to different branches of the government. We observe, throughout the separation of the legislative, executive, and judicial powers, a feature, which renders it justly dear to the people. Hence it has become our boast, that ours is a government of laws, and not of men. The judiciary surely will never give its sanction to so gross a violation of these principles, as would take place if the defence which is now attempted to be made were allowed to prevail.

If, then, the president has no power to dispense with the law, it follows undeniably, that his knowledge and approbation of the offence, cannot be a justification to the offender. If the president has acted improperly, or failed in the execution of his duty, his conduct may be the subject of inquiry before another tribunal. If he has been guilty of crimes or misdemeanors, he is answerable upon an impeachment. The defendant is answerable for his conduct before this court, and a jury of his country.

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It is said, however, by the adverse counsel, that if the defendant be not fully justified by the assent of the executive to his offence, yet that circumstance must operate materially to mitigate his punishment. If this idea be analysed, it will appear to rest upon the fallacy, which, I trust, I have already sufficiently exposed. If the president has no power to dispense with the law, it must follow, that an attempt to dispense with it would be altogether a void act, and could not afford any pretence of palliation or mitigation to the offender. But the counsel say that the defendant was, or might have been ignorant of this, and might have supposed that the assent of the executive would shield him from the penalties of the law. This would be to allege ignorance of the law as a defence; and they might as well have urged that the defendant was ignorant of the statute prohibiting military expeditions, upon which he is indicted. Some of the counsel have indeed had the hardihood to assert in terms, that ignorance of the law is an excuse. The maxim of law on this subject, undoubtedly is, that *ignorantia juris quod quisque tenetur scire neminem excusat.* This rule must be as much applicable to matters which are urged for the purpose of palliation or extenuation, as to those which are presented by way of justification or complete defence. Were it otherwise, the veriest villian in society might escape from justice, under the pretence that he was ignorant of the law, or that he thought the law was dispensed with in his favour, to enable him to perpetrate offences prohibited to every other person. Our law does not recognise such an absurdity. Every man is bound to know the public laws of the land; and if he violates them he does it at his peril. Upon these principles, how does the proposed vindication of the defendant appear? The counsel say that he had the countenance or the connivance of the executive, in the unlawful expedition. What then? I answer he was bound to know, not only the public statute of the United States, but also that the president has no power to dispense with its provisions. The countenance, or connivance, or consent of the president, can, therefore, neither justify his conduct, nor mitigate his punishment. An idea was thrown out by the last counsel, that we were in a state of war with Spain, at the time the expedition was prepared, and that therefore the case does not come within the statute, which relates only to military expeditions set on foot against foreign states, with whom the United States are at peace. It would be a sufficient answer to this idea,

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at present, to say that this is not now a question before the court. The inquiry at present, is simply, whether the matters stated by colonel Smith in his affidavit, as the testimony which the absent witnesses can give, are material to his defence. It is upon this affidavit alone that the postponement is now asked for. Colonel Smith does not state that he expects to prove any thing respecting the state of peace or war, by the absent witnesses. On the contrary, he states that their testimony will relate entirely to other objects. The affidavit states that the expedition was set on foot with the knowledge and approbation of the president; but contains not a word of a war with Spain. But this is not the only answer which may be given to this idea of war with Spain. It must appear affirmatively on our part, at the trial, that the United States and Spain were at peace. How is this to appear? The constitution vests the power of declaring war in the legislature. It is a power given up by the states to the general government, as an attribute of the national and supreme authority. It must, therefore, appear from the acts of the legislature, that the country is at war. But, the counsel say that an actual state of war may exist without the declaration of congress, and have attempted to cite instances of such wars.

There is no instance in which the president has undertaken to make war, but in pursuance of the provisions of the constitution and laws passed under it. He certainly has power to repel invasions, and suppress insurrections; but even this is a power not vested in him by the constitution, but is expressly delegated to him by a statute. Act of Feb. 28, 1795.

The counsel also speak of the late war with Tripoli. That war was also authorised by an act of the legislature.

PATERSON, J. desired *Mr. Sanford* to lay that law before the court, accordingly the law in *vol.* 6, *p.* 8, was handed up.

Sanford. But the question of peace or war, is to be determined by the court upon the laws themselves. The acts of the legislature when they make war, or cause it to be made by others, are like all their other acts; public statutes or general laws which the courts must recognize. So treaties of peace made by the president, with the consent of two-thirds of the senate, are the supreme laws of the land. The judges are bound to know *judicially*, and to conform to these as to all other laws. It follows then, that the question of peace or war, is a question of law, to

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be determined by the statute book, and not a question of fact, to be determined by the testimony of any man.

The treaty between Spain and the United States, made in 1795 is still in force, and must remain so until it be abrogated by an act of the legislature, and as such is the law of the land while it remains in force, there is no power in this country, that can authorise an individual to set on foot a military expedition against Spain, or any of her territories.

In the year 1798, when congress thought proper to enter into a partial war with France, they began by rescinding the treaties and convention, which then existed between France and the United States.

The court will not listen to what has been said, respecting the president's message to congress at their last session, and the measures which may have been projected or proposed in that body, without having been finally adopted. It is absurd to contend, that an individual may infringe the laws at pleasure, because the legislature in their secret deliberations, may have repealed the law or may have declared war.

I do not mean to occupy the attention of the court, in combatting arguments or assertions like these. I have attempted to show that the testimony of the absent witnesses, is not material either for the purpose of justification or mitigation. The case of D'Eon has been cited on the other side. If that case be examined, it will be seen to be a strong authority in our favor. In that case, the court held that they ought to be satisfied that the witnesses were material; that there had been no neglect in the party applying for delay, in endeavouring to procure their attendance; and that there was a reasonable expectation, of his being able to procure their attendance at some future time.

In that case as in this, it appeared negatively that the witnesses were not material; for they were not present when the criminal transaction was charged to have taken place. It is added, if their knowledge relates to any circumstances, that may serve to mitigate the punishment, in case he should be convicted, that sort of evidence will not come too late after the conviction of the offence, and may be laid before the court by affidavit. Upon the whole, they were clearly of opinion, that the putting off the trial could not tend to advance justice, but on the contrary would delay it. This case then is a decisive authority, to

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show that a trial is not to be postponed on account of the absence of witnesses, who, if present, could only give evidence in mitigation of the punishment; such evidence would not be proper on the trial of the issue, and could only be received by the court in its discretion after conviction.

The counsel who opened this argument, threw out an idea that because the jury were judges of the law as well as of the fact, they were therefore, entitled to hear all the testimony which the party might offer. He attempted indeed to modify his position, but he did not divest it of its absurdity. The court are judges of what is proper evidence to go to a jury; and unless the counsel intend to deny this, and insist that the jury are judges of the testimony which it is proper for them to receive, a position which would be equally contrary to the law and practice, I do not perceive the point of this argument. The court, in the first place, judge of the testimony which is to go the jury, and the jury then judge of the fact and the law upon that testimony, which the court suffer them to receive.

Having thus reviewed the ideas of others, and stated my own, upon the question for a postponement, I now pass on to consider the motion for attachment. The adverse counsel suppose they are entitled to the attachment as of course, and have cited some authorities to prove this point. This we deny. The proceeding by attachment against absent witnesses, is undoubtedly known to the law; but such an attachment never issues of course. It is a summary and extraordinary proceeding, which is used by the court in its discretion, to vindicate its justice and punish contempts against its authority. The only rule which can be laid down on the subject therefore, is, that the court may or may not issue the attachment in its discretion, according to all the circumstances of the case. The party injured by the absence of the witness, has his remedy against him by action, without this extraordinary process of the court. When the attachment is issued, it is issued not for the purpose of bringing in the witness to testify, but in order to punish him for a contempt.

The counsel opposed to us, have argued as if we meant to insist that the absent witnesses, are entitled to some peculiar privilege or special exemption from giving testimony. We do not contend for any such exemption; we oppose the application for attachments on other grounds.

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If I have succeeded in any degree, in the preceding part of my argument, I have shown that the testimony of the absent witnesses is altogether immaterial, and could not be received if they were now present. If this be so, it would seem to be a strange absurdity, that the court should be bound of course to issue attachments against persons who are absent, who could not testify if they were present. And unless I deceive myself, it is now presented to the court as a naked question, whether the court shall issue the attachments of course, against absent witnesses who have been summoned, merely because they have been summoned, when it appears to the court, from the statement of the party who calls for them, that they could not have testified in the cause if they had attended. If it be discretionary in the court, to grant or refuse the attachments, as we contend it is, this is surely a case in which they ought to be refused. It was an abuse of the process of the court, to summon persons who could not be witnesses. It would be intolerable to subject those persons to imprisonment, not for any purpose of justice, but merely because they were summoned by a process, which issues of course at the pleasure of every party.

I admit that the court have power to issue attachments, but they will undoubtedly exercise it in sound discretion, for fair purposes, and to promote justice. They will take care on the one hand, to enforce obedience to their process, in all cases where the purposes of justice require it, and on the other they will take equal care, that this process shall never be turned to improper purposes, or employed to harrass men who know nothing of the transaction about which they are summoned to testify.

In addition to this, it appears that the absent witnesses have not failed to attend, from any contumacy or contemptuous disregard of the authority of the court. There are documents before the court, which exhibit the reasons of their absence, and show that they intended no contempt of the court, even if their testimony had been material.

Colden. If the letters in the possession of the court which have not been read are alluded to, and are to be made any use of in this argument, I shall pray that they may be read. There are some parts of them which we think material for us, particularly when one of the gentlemen who write these letters, says he was present, when the president of the United States ordered these prosecutions.

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Sanford. I will read them.—

PATERSON, J. It is unnecessary. We have the papers before us.

Sanford. If the court then are satisfied that no contempt was intended, and that the testimony they could give, were they here, would be immaterial and inadmissible, this surely is not a fit case for attachments. Another objection to the application for attachments arises from the affidavit of the service of the subpœnas. It is stated that the deponent tendered the sum of twenty dollars to each of the witnesses for his expenses. This sum is insufficient, and the service of the subpœnas being therefore defective, that circumstance alone would exempt the witnesses from being liable to attachment. A witness is not bound to attend, unless the full amount of his expenses is tendered to him, at the time of serving the subpœna.

PATERSON, J. Is there any law of congress on that point?

Sanford. Yes, there is a law defining the amount of witnesses' fees.

Colden. This does not apply to criminal prosecutions. We contend that it is not necessary to tender any thing to a witness in a criminal case.

PATERSON, J. What! by the common law?

Emmet. Neither by common law nor by statute. The statute of Elizabeth, was the first law that gave a witness a right to demand his expenses.

Sanford. The whole doctrine is laid down at length, in Sellon's Practice, page 454.

PATERSON, J. Is there any statute on this subject by the United States.

Sanford. The compensation allowed to witnesses by the law of the United States is ten cents per mile for going and returning. This, without any allowance for attendance, would amount to more than twenty dollars, in the case of the witnesses from Washington. In respect to the necessity of tendering the expenses at the time of serving the subpœnas, I conceive the law and practice of this state must govern. This must be a case in which the laws of the United States recognize the law of the state, as a rule of decision. By the law and practice of this state it is unquestionably necessary to tender the expenses. Here I rest the argument in the hands of the able counsel, who will succeed me.

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Colden. The affidavit states more than the district attorney has attended to. The affidavit is that Mr. Madison found fault neither with the quantity nor quality of the money, adding that it was unnecessary to say any thing more on the subject.

Edwards. The vast concourse of people who have constantly attended these trials in every stage of their progress, must convince every intelligent observer, that some motive other than their importance must have produced this effect: From the solicitude discoverable in their countenances, it is evident, an importance has been attached to them, which their intrinsic merits do not justify.

But it is improper for me to be more explicit on this delicate point. The learned and independent court, before whom I appear, will not participate in that glowing sensibility, which evidently warms this assembly; they are above the reach of party views, and will decide with wisdom and the purest integrity. On my part it would be highly indecorous, as well as weak in the extreme, to attempt to influence its decisions on the points submitted, by calling to my aid any consideration which is not intimately connected with such a view of the subject, as must naturally lead to a result, demanded by the strict principles of the laws of our country.

Had the present application been made *simply* for attachments against the non-attending witnesses, and *exclusively* for the purpose of *punishing* them for a contempt of the process of the court, the counsel for the United States would not, on this occasion, have troubled the court with any observation. In that case it would have been a matter between the United States and the witnesses. But the motion before the court has a double aspect.

1st. It is a motion for attachments, to the end, that the witnesses named, may be brought into court and *punished* for a contempt.

2d. To bring them into court to *testify* in these causes.

And if the motion can be sustained for these two purposes, the effect will necessarily be, that the trials must be postponed.

It will be recollected by the court, that I yesterday stated, that an attachment against a witness for *non-attendance*, after having been duly served with a subpœna, is never granted for the purpose of bringing in the witness *ad testificandum*, but *exclusively* for the purpose of *punishing* him for a contempt. At that time *some* of the learned counsel for the defendant treated this proposition as one wholly untenable: this circumstance led me to hope, that I should, on a discussion of

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the question now before the court, have heard from them some remarks, intended to render my position questionable.

But no observations of the kind which I had anticipated, have been made.

I shall, however, not dismiss that point, until I shall have again stated, and attempted to support by authorities, the position which I then with confidence submitted to the court. I repeat then, that in no case do the courts of common law grant an attachment against a non-attending witness, who has been regularly subpœnad, for the *purpose* of *bringing* such witness into court *ad testificandum;* but in such case the attachment is issued, *exclusively* for the purpose of bringing him into court to answer for the contempt, offered to the court, by disobeying its process. In criminal causes, I readily admit, that the practice of granting an attachment against a non-attending witness, subpœnad on the part of the crown, is very antient; but my researches have not yet brought to my view a single case, in which an attachment has been granted against a witness, subpœnad by the defendant in a criminal prosecution.

In point of principle, however, I do not hesitate to say, that it is as consistent for the court to grant an attachment in the latter, as in the former case.

But the question still recurs is an attachment, in either civil or criminal causes, ever granted for the purpose of bringing in a witness *ad testificandum?*

In the case of Bowles against Johnson, 1 Wm. Blackstone, 36, on motion for attachment against one Yerbury for not giving evidence at the assizes, Lee, chief justice says, "this "is a new case. Attachments are a new practice, I remem- "ber the first motion for them." This was in Michaelmas Term, 22 Geo. II. 1748.

A recurrence to the English reporters, will enable us not only to date the birth of this practice, but to fix upon the very time when the first travail throes took place that eventually brought it into existence. In the case of Hammond v. Stewart, 1 Stra. 510, determined Hil. Term. 8 Geo. I. cited also in Wyat v. Wingford, 2 Ld. Ray. 1528, and in the case of Daleson v. Aland, determined in the exchequer, Mich. 10 Geo. I. a rule to shew cause had been granted, but in each of those cases, the rule was discharged by the court.

In Wakefield's case, Cas. Temp. Ld. Harkwicke 299, determined Trin 10 Geo. II. in B. R. Ld. Harkwicke says, "the way of proceeding by attachment is a new method."

In the common pleas Trin. 13 Geo. II. in the case of Huffe against Fowke, and in the case of Stephenson against Brookes,

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reported in Barnes' Notes, 83, the court, in the first case, refused to grant a rule to show cause; and in the second, after having granted a rule to show cause, discharged the rule and refused to grant an attachment, saying that "the party may "have his action upon the stat. of the 5 Eliz. chap. 9."

In the case of Chapman v. Pointou, Easter Term, 14 Geo. II. in B. R. the court say, "that this way of punishing "as for a contempt, was new and practised only in this court; "the common pleas not doing it to this day, but leaving the "party to his remedy on 5 Eliz. 6. 9." 2 Stra. 1150.

From what is said in the case of Stretch and wife against Wheeler, Easter Term, 27 Geo. II. C. P. Barnes, 497, it may fairly be inferred, that at that time the common pleas had not gone into the practice adopted in the King's Bench, long before, of granting attachments for a contempt against non-attending witnesses, who had been regularly subpœnad. In the case of Wyatt v. Wingford, the court made the rule absolute for granting an attachment. This happened 2d July, 1728.

The origin of the practice of granting attachments against witnesses in civil causes having been thus clearly exhibited, I proceed to establish the proposition, that attachments are never granted for any other purpose than that of punishing the witness for a contempt. Lord Raymond in giving the opinion of the court in the case of Wyatt v. Wingford, says, "But the court in this case thought it was a good foundation "for an attachment; the disobedience to the subpœna being "a contempt to the court." Not a word is said in this case by the court, or the counsel, that insinuates an idea that the attachment was moved for in order to bring the witnesses into court to testify. But there is a circumstance in this case which puts it beyond a doubt, that that could not have been the purpose for which the motion for an attachment was made. One Rolf Baily had been subpœnad to attend the assizes in a cause in which Wyatt was plaintiff, and Wingford defendant; and there had been a tender to Baily of his charges; Baily did not attend, whereby the plaintiff was nonsuited. This is the state of the case as reported in 2 Strange, 810, by the name of Wyatt v. Winkeworth, but confessedly the same case as that reported in Lord Raymond, by the name of Wyatt v. Wingford. Surely after the cause was out of court, the plaintiff having been nonsuited, it must have been idle indeed to have moved for an attachment, if the object aimed at had been to bring in Baily *ad testificandum*.

In the case of Stephenson v. Brooke, before cited, and the case of Brodie v. Tickel, Barnes 35, which latter case was in

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the common pleas, Hil. 24 Geo 2, were also cases in which a motion for an attachment was made after nonsuit.

To the same purpose is the case of The King v. G. Ring, 8 Term Rep. 585. In this case an attachment was moved for, and granted against Ring for not appearing at the assizes to testify before the grand jury against Everland and Davis, committed to Salisbury gaol on a charge of felony. Ring not appearing the grand jury threw out the bill. Jekyll, on the part of the prosecution, moved for an attachment, and it was granted.

The courts at Westminster always consider the proceeding by way of attachment *as for a contempt* as a *criminal proceeding*.

In the case of Small v. Whitnell, 2 Stra. 1050, the reporter says, "But it appearing not to be a personal service (that "is, of the subpœna) the court held it not sufficient to war- "rant a *proceeding crimindly* against him," (that is, the witness.) In this case an attachment was moved for against a witness for not attending, being subpœnaed and having a shilling left. In the case of Chapman v. Pointou, already cited for another purpose, the court say "that this way of punish- "ing as for a contempt was new," &c.

And so strictly is this proceeding by *way of attachment* against a witness as for a contempt, holden to be a criminal proceeding, that the affidavits and all the other papers in the cause must be entitled, "The King v. the person to be at- "tached."

To this purpose is the case of the King v. the sheriff of Middlesex, 3 Term, 133. It is there said, "But as the affida- "vits on both sides were entitled Robins v. Hall, and as the "rule was drawn up on the civil side of the court, a doubt "arose whether the proceedings were properly entitled, and "the court held them to be irregular, and that a motion for "an attachment in the course of a civil suit, ought to go on "the crown side of the court, and the affidavits entitled 'The "King against the person to be attached,' because it was not "a motion in the cause, but arising out of it."

Further, it is laid down in all our law books which speak on this subject, that granting an attachment is in the discretion of the court; but if granting an attachment for the non-attendance of a witness be *ex debito justitiæ*, the court can exercise no discretion; they have in that case only the power to inquire whether the witness had been duly subpœnaed, and whether the non-attendance was through obstinacy or not?— 2 Strange, 1150, Chapman v. Pointou.

From this review of the history of attachments, as relative to witnesses, we are authorised to say.

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1st. That it never was considered, in the origin or progress of this practice, either by counsel or by the court, that an attachment was granted for the purpose of bringing in the witness *ad testificandum.*

2d. But that an attachment, if granted, was always granted exclusively for the purpose of punishing the witness for a contempt.

But there is another ground on which this motion for attachments may be successfully resisted.

The court will *never* grant an attachment *in the first instance.*

The first motion must be for a rule to show cause.

This was the course pursued in the cases of Hammond v. Stewart, 8 Geo. 1. B. R. 1 Stra. 510. Daleson and Aland, 10 Geo. 1. in the exchequer. Stephenson v. Brooke, 13 & 14 G. 2. Chapman v. Pointou. Wyatt v. Wingford, 2 G. 2. B. R. Stretch & wife v. Wheeler, Barnes, 497. 27 G. 2. I mention only the earliest cases.

The case of Chaunt v. Smarl, 1 Bosanquet and Puller, 477. in the common pleas, sets this point at rest. Here the court say, "That in future the practice of this court should "be conformable to that of the King's Bench, and the rule "should be to show cause why the attachment should not "issue *in all cases*, except of non-payment of costs on the "prothonotary's *allocatur.*"

The motion for an attachment in the first instance, is certainly irregular, and therefore the defendant can take nothing by his present motion. But it has been contended by the counsel for the defendant, that this question, viz. "Shall an attachment be granted to bring in a witness *ad* "*testificandum?*" rests in the courts of the United States on the basis of the constitution. For by the 8th article of the amendments of the constitution, it is among other things provided, "That in all criminal prosecutions, the accused "shall enjoy the right, &c. to have compulsory process for "obtaining witnesses in his favour." That therefore it is the constitutional right of the defendant to have an attachment to bring in his witnesses, and that nothing short of an attachment will be compulsive process according to the true spirit and meaning of this constitutional provision.

The words relied on by the counsel for the defendant are "To have compulsory process for obtaining witnesses "in his favour."

If the meaning of the word "*compulsory*," here used, can be determined, we shall find no difficulty in ascertaining,

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with perfect precision, the degree of weight which ought to be allowed to the argument urged by the defendant's counsel.

Process to compel the attendance of witnesses in criminal and civil causes was a kind of process well known to the people of the United States long before, and at the time the articles of amendment to the constitution were adopted. They borrow their language, their laws, and of course the technical terms of them, from England.

The only process to compel (in the first instance) the attendance of witnesses in criminal or civil causes, known to the courts of common law in that country, and in this, is a subpœna. No other process is ever issued in England but a *subpœna* even in criminal causes. When the parliament enacted the statute of 7 Wm. 3 cap. 3, part 7, the crown possessed no right to use any other process than a subpœna to compel the attendance of its witnesses. Until the making of that statute, the prisoner could by no process compel the attendance of his witnesses. By that statute it is enacted, "That every person who shall be indicted for high "treason, whereby any corruption of blood may be made, "shall have the like process of the court where he shall be "tried to compel his witnesses to appear for him at such "trial, as is usually granted to compel witnesses to appear "against him."

In England, then, a subpœna is *compulsory process;* it is the only compulsory process (unless entering into a recognizance to appear at the trial be called process) provided for the crown, or the prisoner, by the laws of that country.

The article in the constitution of the United States, relied upon by the defendant's counsel, it is true, has no relative clause in it, as the statute of 7 Wm. 3. has; for that says, "He shall have the like process of the court where he "shall be tried to compel his witnesses to appear for him "at such trial, as is usually granted to compel witnesses to "attend against him."

This, however, cannot help the argument of the defendant's counsel. The constitution has not told us what that process shall be, but has used the word process in reference to obtaining witnesses. The words, compulsory process, are used as being terms the meaning of which was then well understood. It was to be process which would, according to the legal notions existing in the minds of the framers of the constitution, be adequate to compel the attendance of the witnesses of the accused.

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To the present moment the United States cannot use any other process to compel the attendance of witnesses on their behalf in criminal causes, than a subpœna, and no one has ever entertained an idea, but that a subpœna, when used in such cases, is compulsory process, or, in other words, a process to compel the attendance of witnesses.

One of two things must have been in the intentions of the people of the United States when they adopted this amendment:

First. That in all criminal prosecutions, the accused should have such compulsory process for obtaining witnesses in his favour as was then known to our laws, and used for such a purpose; or,

Secondly. That a new kind of compulsory process, not hitherto in use in our courts, or known to our laws, for the purpose of compelling the attendance of witnesses in behalf of the accused, should be provided.

If the former was the intention, then clearly the motion for attachments must be denied, for an attachment in our laws is not known as compulsory process for obtaining witnesses, but the process of subpœna is the only process recognised by our law for obtaining witnesses.

If the latter was the intention of the people of the United States, the amendment relied upon has only provided that the accused shall have a right to compulsory process, for obtaining witnesses in his favour of a new kind not hitherto known to our laws. The amendment not having prescribed what that process shall be, not having said that it shall be an attachment, a warrant, a *capias*, or pointed out any of its attributes other than that it is to be "*compul·ory*," they have, therefore, left the kind of process to be designated and prescribed by a law of congress; for courts of law cannot make a new process wholly unknown to the common law, and unauthorised by act of congress, and not prescribed by the constitution. So in article 3d, sec. 1st, of the constitution of the United States, it is declared, that "the ju-"dicial power of the United States shall be vested in one "supreme court, and such inferior courts as the congress "may from time to time ordain or establish." But those courts must be created by act of congress before they can exercise any of the powers conferred on them by that article of the constitution. So in this case, if a process, not known to the existing laws, be directed, in order to compel the attendance of the witnesses of the accused, that process must be provided and established by an act of congress.

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But the framers of the constitution never contemplated any other compulsory process than that already known to our laws, and constantly used, viz. a subpœna.

If by the expression in the amendment relied upon "shall have a right to compulsory process for obtaining "witnesses in his favour," the defendant has a right to an attachment, why was it not used in the first instance? why was a subpœna the first process that he thought proper to use? There is no intimation in the article relied on, that the accused is first to use some other process than an attachment, but it is absolute, "a right to have *compulsory* "*process*," and if it be the right of the accused to have an attachment at all for obtaining his witnesses, he has a right to have it in the onset. But if he had a right to have an attachment in the first instance, *ex debito justitiæ*, why did he not use it? He has been guilty of latches in not taking out an attachment instead of a subpœna. Had he taken his compulsory process in the first instance, he would on this day have had his witnesses in court. But he neglected to do this, and therefore he cannot now have the trial postponed for the *purpose of taking out his attachment*, that is, "*compulsory process for obtaining witnesses in his fa-* "*vour*;" which process, according to the construction of the constitution contended for by his counsel, he had an undoubted right to have taken out in the first instance.

But we resist this motion on another ground. The motion is in effect, to postpone the trial of the cause for the reason stated in the affidavit. Before it will be granted, the defendant must satisfy the court that the gentlemen named in it, are *material* witnesses; and that he has been guilty of *no laches* or neglect, in omitting to do all that he might have done to procure their attendance. These are principles laid down by the court, in the case of the *King* v. *Le Chevalier D'Eon*, 3 *Bur.* 1513, and are founded in good sense.

The affidavit upon which the present motion is founded, appears to have been shaped with a view to these principles, for it states "that the defendant expects to be able to prove "by Mr. Madison" and others, "that the expedition and "enterprise, to which the said indictment relates, was began, "prepared, and set on foot, with the knowledge and approba- "tion of the president of the United States," and "that if "he had any concern in the said expedition and enterprise, "it was with the approbation of the president of the United "States, and the said James Madison," and "that he expects "to be able to prove by the said witnesses, that the prosecu-

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"tion against him for the said offence, charged in the said "indictment, was so commenced and prosecuted by order of "the president of the United States, and "that he has been "informed, and doth verily believe, that James Madison and "Robert Smith are prevented from attending, by the order "or interposition of the president of the United States."

Their testimony, it is urged, is material in two points of view.

1st. It will show that the United States were not, at the time when the enterprise is alleged to have been set on foot, "at peace with Spain."

2d. Should the court be of opinion, that it is not material in that respect, it is material for the purpose of showing to the court, the degree of criminality attached to the defendant, by any agency which he may have had in beginning or setting on "foot the expedition" alleged, and thereby enabling the court to *proportion* the punishment of the defendant according to the degree of his guilt. That to enable the defendant to obtain the testimony of these witnesses for this purpose, it is necessary that he should now be furnished with compulsory process; for after a verdict of *guilty*, any testimony to this purpose must be laid before the court by affidavit, and the law knows of no process by which a witness can be compelled to make such an affidavit.

In support of the first proposition it is urged, that the testimony expected from these witnesses, will establish this as a fact, that the United States were not, at the time when the alleged offence is supposed to have been committed, *at peace* with Spain; for it will certainly evince that "the expedition "and enterprise" referred to, "were began, prepared and "set on foot, with the knowledge and approbation of the president," and this "approbation" necessarily implies, on the part of the president, an acknowledgment that the United States were then at war with Spain, and by the constitution of the United States, the president possesses the power of determining whether the United States were at war or not, in cases where any aggressions and acts of hostility have been committed by a foreign nation upon the territory, or citizens of the United States. If the constitutional principle, which is assumed by the defendant's counsel, cannot be maintained, the first ground, viz. the materiality of this testimony in point of justification, must be abandoned.

In support of this proposition, "that by the constitution "of the United States, the president possesses the power "contended for," much stress has been laid on the 3d section of the 2d article of the constitution. "He," (the president)

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" shall, from time to time give to the congress, *information* o
" the *state* of the union." These words, it has been insisted give to the president the power of *determining*, whether th United States *are* or *are not* in a state of war.

This section, if susceptible of the construction contended for, must also, of necessity, give to the president the power o *determining*, after war shall have been declared by congress that the United States are at *peace;* and of course of repealing the act of congress, by which war may have been declared.

The words are, " give to the congress *information* of the " *state* of the union."

In the 8th section of the 1st article of the constitution, it is declared, that " the congress shall have power to declare " war." Here this power is given in a most explicit manner. But, if the construction of the 3d section of the 2d article be as contended for, then the constitution, in point of effect, reads: thus " congress shall have power to declare war, but " the president shall have power to determine when the Uni- " ted States are at war, and when they are at peace," " notwithstanding congress shall have declared that the United " States are at war."

And I ask the learned counsel, what will prevent the president from putting an end to a war declared by congress, the very next moment after it shall have been declared by them, provided it be true, that by stating to congress that the United States are not at war, he can change the state of the country from that of war to that of peace. Was it ever until the present pressing occasion, imagined, that by making it the duty of an agent, to give information to his principal of his *business*, that thereby the agent was vested with the power of altering the condition of the principal.

It is undoubtedly made the duty of all the envoys of the United States in Europe, " from time to time, to give infor- " mation of the state" of our affairs with the respective powers, at whose courts they represent the United States; but was it ever imagined that those envoys thereby became invested with a power to alter the state of our political relations? The president is obliged by the constitution, to give to the congress information of the state of the union; a power to give to the congress *information* of the *state* of the union; and a power to declare to congress, what is our political relations as to other nations in point of war or peace, are very distinct powers. The one regards the statement of facts, affecting the United States, which have occurred and come to the knowledge of the president; the other regards

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the power of determining what shall be the legal effect of those facts, as to the political state of the nation, and its relation to other nations.

The framers of the constitution of the United States appear to have perfectly well understood and duly appreciated the principles expressed by Vattel, in Book III. ch. 1. sec. 4. "As nature has given to men the right of using force, only when it becomes necessary for their defence and the "preservation of their rights, the inference is manifest, that "since the establishment of political societies, a right so dangerous in its exercise no longer remains with private persons, except in those kinds of rencounters, where society "cannot protect or defend them." For in the congress of the United States *solely* and *exclusively* did they place the power of *making war*. As it is the people who are to endure the fatigues and calamities, and sustain the waste of blood and treasure inseparable from war, they have confided the power of making it to their immediate representatives. They have therefore declared that "the congress shall have "power to *declare war*, grant letters of marque and reprisal, "and make rules concerning captures on land and water."

But the wise men who framed the constitution did not stop here; lest the right of making war should be claimed by the several states, they cautiously inserted in the constitution a prohibitory clause; they declared that "no state "shall without the consent of congress, lay any duty of tonnage, &c. or *engage in war*, unless *actually invaded*, or "in such *imminent danger* as will not *admit of delay*." By the constitution, therefore, no state can engage in war, unless for the purpose of self-defence, and then, *only* when "*actually* invaded or in such *imminent danger* as will *not* "*admit of delay*." But if the proposition contended for by the defendant's counsel be correct, then it follows that although the people of the United States have conferred on congress the power of declaring war, and have denied the power of engaging in war in any event whatever, but those specified in the 8th sect. of the 3d art. of the constitution, to every state in the union; yet that they have, by declaring that the president "shall, from time to time, give to "the congress *information* of the state of the union," by necessary implication, given to him also the power of declaring that the United States are in a state of war, or, in other words, of declaring war. That is to say, because it was the duty of the president to give *information* to the congress, that some Spanish troops had come into the ter-

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ritory of the United States, and in a hostile manner carried off the Kempers, and the president, in fulfilment of his duty had given to congress information of those facts, therefore the president did declare the United States to be at war with Spain.

To give to such a course of reasoning the semblance of solidity, the gentlemen, to be consistent with themselves, must go further; for the words relied upon are imperative. "He shall," &c. If, then, by giving to the congress information that acts of hostility have been committed against the United States by Spain (and this it was his duty to do) he necessarily declared war, it follows, that the constitution has imposed upon the president the duty of declaring war in all cases, when acts of hostility have been committed upon the territory or citizens of the United States. If giving informa ion of the state of the union, means stating to congress what is the existing political state of the United States as to war, then it follows, that he possesses the power of determining that our treaty with the sovereign of any nation with which we may be thus declared to be at war, is at an end; for if the United States are at war, such treaty is no longer obligatory.

If, however, I should yield to the gentlemen this strange, and until this argument, unheard-of interpretation of the constitution, will it profit the defendant? Has the president given to congress information that the United States were in a state of war with Spain? Has he announced that our relation to that country has become that of war? I ask, what has he done? Why, it is alleged that he has approved of this expedition, therefore the United States are at war. To those who are capable of being misled by such reasoning, any observations within the compass of my abilities to urge, would be urged in vain.

But it has been asked, what if Spain should declare war against the United States, are not the United States *de facto* at war with Spain? Would the United States, in such an event, be at peace with Spain: I answer, whenever such a case shall happen, it may then be proper to consider whether the United States are *de facto* at war with Spain; it is sufficient for us at present, to say, that no such case had happened when the offence charged in the indictment was committed. But should it be granted that in such a case the United States must be considered as being at war with Spain, that state of war would be produced by the declaration of war on the part of Spain, and not by the act of the

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president in giving information to congress of the existence of that fact.

But the principle contended for is as novel as it is strange.

If we turn our attention to the practical interpretation of our constitution given by congress under the two former administrations, we shall find nothing to countenance the construction contended for, but much to convince us that it is wholly untenable. On the 27th of March, 1794, congress passed an act entitled an act to provide a naval armament. The preamble is in these words: "Whereas the "depredations committed by the Algerine corsairs on the "commerce of the United States, render it necessary that "a naval force should be provided for its protection." 3d vol. L. U. S. 24. It is here admitted by congress that such depredations had been committed by the Algerine corsairs, as render it necessary that a naval force should be provided for the protection of its commerce. And in sec. 9, of the same act, it is enacted "that if *peace* shall take "place betwen the United States and the regency of Al- "giers, that no further proceedings be had under this act." President Washington had given to congress information of the state of the union in relation to depredations committed by the Algerines, but it was not considered that his having given this information, *de facto* placed the United States in a state of war with those barbarians; but congress, this notwithstanding, not only declare that such have been the depredations committed by the Algerines, but in the 9th sec. declare that the United States are *not at peace* with the regency of Algiers. On the first of July, 1797, a time when our affairs with France wore an aspect very much like war, her cruisers and national ships having committed most unjustifiable depredations on our commerce, congress passed another act entitled an "act to provide a naval arma- "ment," and by the 12th sec. authorised the president to increase the strength of the revenue cutters, and to cause them to be employed in defending the sea-coast of the United States, and to repel any hostility to their vessels committed within their jurisdiction.

It is in the recollection of the court that outrages on the part of France, unparalleled by any thing yet done by them, towards the United States, had been offered. These were stated by the president in a most explicit manner; a special congress convened for the purpose of taking these outrages into consideration. But this congress did not deem it their duty to declare that those outrages amounted to

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war. The president did not imagine that he possessed the power to produce that state of things called war; and congress did nothing more than to provide for the defence of the commerce of the United States, *within its jurisdiction* The discontents between this country and France still wearing the appearance of an approaching war, on the 28th May, 1798, it was enacted by congress "that the president of the "United States be authorised, in the event of a declaration "of war against the United States, or of actual invasion of "their territory by a foreign power, or of imminent danger "of such an invasion discovered in his opinion to exist, be-"fore the next session of congress," to cause to be enlisted, &c. From this it is manifest that even at this time congress does not admit that we were at war with any foreign power. On the same day congress passed an act entitled "an act "more effectually to protect the commerce of the United "States;" the preamble to which is in the words following, viz. "Whereas armed vessels sailing under authority, or pretence of authority, from the Republic of France, "have committed *depredations* on the commerce of the United "States, and have recently *captured the vessels and property* "*of citizens thereof, on and near the coasts, in violation of* "*the law of nations, and treaties between the U. S. and the* "*French nation*, therefore, &c. Here is an admission by congress, that *armed vessels* sailing *under authority*, or pretence of authority, *from the Republic of France*, had committed depredations on our commerce, and captured our vessels in or near our coast, *in violation* of the *laws of nations and of treaties* between the U. S. and the French nation. But what did they do?—"Authorise the president to instruct and direct the commanders of the armed vessels be-"longing to the U. S. to take, seize, and bring into any "part of the U. S. to be proceeded against according to the "laws of nations, any such armed vessel which shall *have* "*committed*, or which shall be found *hovering on the coasts* "of the U. S. for the purpose of *committing depredations* "on vessels belonging to the citizens thereof; and also to re-"take any ship or vessel of any citizen of the U. S. which "may have been captured by any such armed vessel." 4 vol. 120. Defence only is what they authorised, but congress did not even then declare that we were in a state of war. Sixteen days after this, congress passed another act, entitled "An act to suspend the commercial intercourses between "the U. S. and France, and the dependencies thereof." 4 vol. 129. This act is what its title bespeaks it to be. By its 5 sect. it is provided "That if before the next session of con-

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"gress, the government of France, and all persons acting by "or under their authority, shall clearly disavow, and shall "be found to refrain from the *agressions, depredations and* "*hostilities which have been, and are by them encouraged* "*and maintained against the vessels* and other property of "the citizens of the U. S. and against their national rights "and sovereignty, *in violation of the faith of treaties and* "*the laws of nations*, and shall thereby," &c. Congress in this section have put it on record, that the government of France had been hostile, and at the time of making this act, were committing *depredations* upon the vessels and other property of the citizens of the U. S. and *against their national rights and sovereignty, in violation of the faith of treaties and the laws of nations*, but still congress does not declare war, nor admit that the U. S. are in a state of war.

On the 22d *January*, 1798, an act was passed authorising the president to increase the strength of the revenue cutters, "for the purpose of defence against hostilities "*near the sea-coast*;" and on the 25th of the same month, congress passed an act authorising "the commanders and "crews of any merchant vessel owned wholly by a citizen "thereof, to oppose and defend against searches and re- "straints by the commanders and crews of any armed ves- "sel sailing under French colours, and to repel force by "force." 4th vol. 148. Here again is a congressional declaration, that "*lawless depredations and outrages*," had been "hitherto encouraged and authorised by the govern- "ment of France," that that government had not caused "*the laws of nations to be observed* by armed French ves- sels;" but no declaration of war, or admission of its existence.

On the 7th *July*, 1793, an act passed, entitled "An act "to declare the treaties heretofore concluded with France, "no longer obligatory on the United States." On the 9th of that month "An act further to protect the commerce of the United States," was passed, giving to the president the power of "instructing the commanders of the public "armed vessels employed in the service of the U. S. to "subdue, seize and take any armed French vessels," "and providing for their condemnation and other pur- poses." In addition to those, other acts were passed, to some of which I shall refer. 4 vol. L. U. S. 264, 271.

But I will now close my remarks upon acts of congress, by reading the first section of an act passed the 2d of *March*,

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1799, entitled "An act giving eventual authority to the "president of the U. S. to augment the army," &c. 4 vol. 489, by which it is enacted "That it shall be lawful for "the president of the U. S. in case *war should break out* "between the U. S. and a foreign European power, or in "case imminent danger of invasion of their territory by "any such power shall, in his opinion, be discovered to "exist," &c. Here we have a declaration made by congress, and by the president of the U. S. that notwithstanding all that had hitherto happened, no war had as yet "broken out between the U. S. and France."

What are the plain obvious inferences which press themselves upon us from all these acts of congress. 1st. That acts of hostility committed by a foreign power against the U. S. or their citizens, do not necessarily place the country in a state of war. 2. That acts of hostilities, though "outrageous, in violation of the laws of nations, and in con- "travention of existing treaties," had been committed upon the U. S. by a foreign nation, yet presidents Washington and Adams never entertained an opinion, that by declaring to congress the existence of these facts, they thereby placed this country in a state of war. 3. That congress have always considered the power of declaring war to be invested exclusively in them. 4. And that such has always been the understanding of the nation.

But a principle still more dangerous has been advocated. "That whether the U. S. be at war or at peace, is a ques- "tion of fact, to be determined by the jury, from facts "which may be proved to exist in *pais* independent of any "act of congress." That is, that a jury of twelve men are the proper constitutional judges to decide whether our nation is at war or at peace, though congress shall not have declared war, though the president shall not have said that we are in a state of war, and though war may not have been declared against us.

To all this, I answer, in a few words, that to very little purpose indeed have we cautiously and expressly confided by our constitution, to the representatives of the nation, the power of declaring war, if the peace of the nation may be compromitted by a jury, however honest and well intentioned.

Wretched, supremely wretched, is the condition of the people of the U. S if such a power be in the hands of every jury which may be empannelled to try a criminal. All other civilized nations have intrusted that power to the

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sovereign of the state; but here a jury of twelve men, whether congress has declared it or not, whether the president has announced it or not, is competent to place upon the records of our courts, that we are at war. To say to Spain, "the United States are at war with you." What will not Spain be justified in doing, if this be a constitutional mode of settling the question, and a jury by their verdict shall say the U. S. are at war? May she not say and act accordingly: "your nation is at war with ours; this "has been declared, as appaers by the records of your "country, by its constituted authorities. We, therefore, "will capture your vessels, enslave your citizens, bombard "and sack your towns, and slaughter your inhabitants." Thus she will have a right to say to us, and thus may she lawfully treat us.

Nor can the admission of this testimony be sustained on the second ground. What have the jury to do with the question,—"what is the degree of the defendant's criminality? They are to determine whether he is guilty of the crime charged, but they are not to decide whether there be any mitigating circumstance which ought to lessen the punishment. The court exclusively must settle this question. The authorities cited by the counsel for the defendant do not at all support the admission on the ground which is here contended.

In the case of the King v. Lord Anglesea, the court permitted the counsel for the crown to go into evidence calculated to show that Lord Anglesea sought after an opportunity, and persisted in the pursuit of the purpose eventually accomplished; and it certainly was very proper, when attempting to show the nature of the crime charged upon the prisoner, to adopt such a course of proceeding, when the precise nature of the crime committed could not otherwise be ascertained to the jury.

The cases from 1 M'Nally, 320, 321, 322, 323, by no means favour the gentlemen opposed to me. They only establish this rational principle, *that the prisoner may call witnesses to his good character, and that the witnesses so called, may, in such cases, relate particular facts within their knowledge, which have induced the good opinion entertained by them.* Thus Lord Kenyon expressed himself in the case of the King v. Thelwal, at a special commission of *oyer and terminer*, in 1793, at the Old Bailey, as follows: "An affectionate and warm evidence of character, "when collected together, should make a strong impression

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"in favour of a prisoner, and when those who give such cha-
"racter in evidence are entitled to credit, their testimony
"should have great weight with the jury;" and such evi-
dence is in the very nature of things relevant. If the charac-
ter of the prisoner has always been fair, it is certainly less
probable that he should have committed the crime charged,
than if his character had been notoriously bad. As to the
solitary remark of Judge Down, in the case of the King v.
Mockler, it stands alone, unsupported by any authority, or
even the dictum of a single advocate or elementary writer.

The testimony offered, then, if there is any weight in this reasoning, is wholly irrelevant. If Mr. Madison and the other witnesses were now here, and sworn in this cause, they would not be permitted to give in evidence to the jury, any of the facts alleged in Col. Smith's affidavit; because they would not tend to show that the defendant was not guilty. The president of the U. S. possesses no power to dispense with the laws, but, on the other hand, is bound by his official oath to preserve them inviolate, and to defend the constitution of the U. States.

But it is incumbent on the defendant to show that he has been guilty of no laches or neglect in his endeavours to procure the attendance of the witnesses. Has the defendant done his duty in this particular? He has served subpœnas on his witnesses, he has tendered to them twenty dollars. The distance from the city of Washington to this place is 240 miles. By the 6th sect. of the act, passed 28th *February*, 1799, it is enacted "that the compensation to jurors and
"witnesses, in the courts of the United States, shall be as fol-
"lows: to wit, to each grand and other juror, for each day
"he shall attend in court, one dollar and twenty-five cents;
"and for travelling expenses, at the rate of five cents per
"mile from their respective places of abode to the place where
"the court is holden, and the like allowance for returning."

This compensation, we contend, the witnesses were entitled to receive before they started from Washington. The law imposes no obligation upon a witness to give a credit to the defendant. A witness, by the subpœna, is called upon to leave his business, to travel to the place of holding the court, and to remain there until the cause is decided or he is dismissed. But is the witness compellable to do this until he receives his compensation? The words are "the compen-
"sation to witnesses in the courts of the U. S. shall be," &c. In England, since the statute of 5 Elizabeth, ch. 9. no witness, until his reasonable expenses are tendered to him, is bound to appear at all; nor, if he appears, is he bound to

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give evidence till such charges are actually paid. 3 Blk. Com. 369. Congress, however, has not left this question, "what are reasonable expenses? open for discussion," but has declared that five cents a mile for going to, and the same for returning from, court, shall be the compensation to which he shall be entitled. But if the witnesses are holden by law to attend without this compensation being first paid, how are they ever to obtain it? How, but by suit? And if the witness, through poverty, is unable to attend, is he notwithstanding to be adjudged guilty of a contempt?

The question as to the construction of the statute of *5 Eliz.* ch. 9. in this regard, came before the court of Common Pleas, in the case of Fuller v. Prentice, 1 H. Blk. 49, on a motion for an attachment. But the court refused the attachment, saying, "that it might afford a dangerous precedent, "by which witnesses coming from their places of abode to "attend at trials, might be deprived of the re-payment of "their necessary expenses; the whole of which, as well of "their going to the place of trial, as of their return from it, "and also during their necessary stay there, ought to be tendered to them, at the time of serving the subpœna, otherwise an attachment would not lie." And yet in that case, 2s. 6d. had been given to the witness, and a promise made to bear all her expenses, and a place was taken for her in the stage, and she had promised that she would go, but when the stage called she refused to go, and confined herself in her house.

The statute of Eliz. is substantially the same as the act of congress. By the former it is enacted "that if any person "upon whom process shall be served to testify or depose, "and having tendered to him such reasonable sum of money for his or their costs and charges." Suppose the words in that act had been, "tendered and paid to him "ten cents per mile for his costs and charges," &c. would not that statute, if thus expressed, have, in effect, declared that ten cents per mile should be the compensation to the witness? What are the words of the act of congress? "The "compensation to jurors and witnesses in the courts of the "United States, shall be," &c. Compensation necessarily implies satisfaction or payment for something done, or to be done by the witnesses. Before the statute of Eliz. no law existed by which witnesses could insist on payment of their reasonable costs and charges. Congress by this act have provided that they shall be compensated for their costs and charges, and, to put to sleep all controversy about what should be considered as reasonable costs and charges, have said, it shall

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be ten cents per mile, &c. The right of a witness to compensation, and the amount of compensation are both settled by the act of congress, and by necessary implication. The duty of the party who serves process on the witness, is also settled for the act says what the compensation shall be, but it is no compensation if it is not paid. Was it not, therefore, the duty of the person in whose behalf the witness was served with process, to have tendered or paid the ten cents per mile if he intended, in case the witness did not appear, to proceed against him for a contempt. But the compensation has not been paid or tendered to the witnesses, nor does the affidavit of the person who served the subpœna help the gentlemen over this difficulty. He says that he offered Mr. Madison more, but that he observed that it would be to no purpose. In the case of Fuller v. Prentice 2s. 6d. was tendered to the witness, a promise was made to bear her expenses, a place was taken for her in the stage-coach, she promised to go, and *more money* was offered, and yet an attachment was refused. On no principle, therefore, can an attachment be issued against Mr. Madison.

An attachment for the purpose of bringing in a witness *ad testificandum*, is never granted.

The article of amendment to the constitution has instituted no new compulsory process.

The testimony which the witnesses named could give, if present, as stated in the defendant's affidavit, is wholly irrelevant, and the motion for an attachment is premature.

Wednesday, July 16, 1806.

Some desultory conversation arose at the bar, when the argument proceeded:—

Emmet. The counsel for the prosecution, who last addressed the court, adverted to the interest and anxiety which, from the number and respectability of the audience, it is manifest that this cause has excited in the public mind; and he was pleased to intimate, that he had it in his power to assign a motive for this general solicitude, totally different from the actual importance of the prosecution.—To me, I confess, it appears, that the novelty and nature of the questions heretofore agitated, and those likely hereafter to arise in the course of these trials, are fully sufficient to fix the public attention upon the proceedings of this court. You are making precedents in criminal jurisprudence, the influence of which may hereafter be very great and extensive; and you are doing so under the judiciary system of the United States, where precedents of that na-

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ture are by no means common. Besides the enterprise, with which the defendant is supposed to be connected, is in itself calculated to awaken in his favour the most general sympathy and interest. It was therefore hardly worth the learned counsel's while to hint, with some appearance of severity and censure, at any extrinsic inducements for the portion of attention, that the public may bestow upon our proceedings. But if in doing so, and if by the motive which he did not think proper to assign or specify, he intended to allude to any thing in the conduct of the defendant's counsel, as one of them, standing in a very extraordinary and delicate situation, I intreat the indulgence of the court, while I say a few words about myself.

Attached as I am by the strongest connection to those principles, which placed the present administration in power; feeling for the members who compose it the sincerest esteem; and wishing to see them exalted on the highest pinnacle of respect, it will be with extreme reluctance and personal pain, that I shall perhaps, in the course of these proceedings, press inferences or facts, somewhat derogatory to that dignified and honourable reputation, which they have most deservedly acquired. In the present cause, however, no sentiment of private respect or public feeling can be permitted to interfere with the discharge of my professional duty. Colonel Smith has done me the honor of thinking that my exertions may be useful to him in the conduct of his defence; and surely there is nothing in the character of that gentleman, nor even in the fact with which he is charged, that could justify my withholding those exertions; more especially, since (if those things which he has stated to me in private, and sworn to in court, shall be proved on his trial) I cannot but consider him as "a man more sinned against than sinning." The learned counsel, however, may rest assured, that although I shall earnestly urge whatever I conceive pertinent and necessary to my client's defence, I shall not be induced by any wish of exalting my own character, or acquiring the favour of any party or description of men, to wound the feelings of those whom I respect, or to urge what may be unpleasant to them, farther than is indispensably necessary. I have no wish through this trial to excite unfavourable impressions against any one; on the contrary, most gladly would I erase all memorials of it from the records of this court, and blot out from the public mind all remembrance of it, and of the transactions to which it has given rise. What irresistible motives caused it to be commenced I cannot

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presume to divine; but it is the only error that I feel inclined to impute to the administration; for as to the part they took, according to my client's statement, in the enterprise, for assisting which he stands indicted, I trust, before I conclude, I shall evince myself to be not only the defender of Col. Smith, but of the government itself. The court will pardon my having spoken thus much of myself; but I conceived this explanation due to the peculiarity of my situation, and to the extent of my obligations to those whose friendship has contributed to place me in a situation so peculiar. I shall now proceed to the matter before the court.

The affidavits, on which these motions must be decided, are, I apprehend, perfectly consistent with each other. Col. Smith considers the gentlemen at Washington as material witnesses for his defence, and assigns his reasons for that opinion, by specifying the facts which he expects to prove from their testimony. These reasons are not removed by Mr. Sandford's affidavit, which does not controvert or doubt any of the facts specified; but merely says, in general terms, that he does not conceive the witnesses to be material. I trust I shall be able when we shall have come to the discussion of that question, to convince the court of their materiality. I propose, with its permission, to argue, first, the motion for the attachment, and secondly, that for putting off the trial.

The counsel for the prosecution have displayed very considerable learning and research in tracing the history and progress of attachments against witnesses in England; but they will allow me to say, that their learning and research have no application to the law on that subject, as it exists in America. The counsel who spoke last, professed to detail what he called the "travail throes" of the measure; but as far as relates to the judiciary of the United States, it had, in this country, no travail throes; it is derived from the constitution, the head of our laws; and like the celebrated offspring of the head, it was consummate at its birth. We claim the process of attachment to compel the attendance of witnesses, as a matter of right, by virtue of the 6th article in addition to and amendment of the constitution (Graydon's Digest xvii. printed as article 8th) which says, that in all criminal prosecutions, the accused shall have *compulsory* process for obtaining witnesses in his favour. By the 14th sec. of the general judiciary act, passed September 24th, 1789 (Grayd. Digest, 243) which gives to the courts of the United States the power "to issue writs

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"of scire facias, habeas corpus, *and all other writs not specially "provided for by statute, which may be necessary for the exercise "of their respective jurisdictions, and agreeable to the principles and "usages of law;*" and lastly, by the sixth section of the act of 2d March, 1793, (Gray'd. Digest p. 256) which provides that "subpœnas for witnesses who may be required to attend a court of the United States in any district thereof, may run into any other district." These provisions form a striking difference between the English and the American law. It may be, as the learned counsel contends, that in England the granting of an attachment is discretionary with the court, which may refuse it, or issue it for the purpose of vindicating its own dignity. In that country the party accused was for a long time wholly unprotected; he could not examine his witnesses on oath, and had no means for compelling their attendance. It was not before the 7 W. 3. c. 3. that any compulsory process for witnesses, was given to the accused; that act was expressly confined to cases where the judgment would work corruption of blood; and that is the only law, even to this day, which gives such process in any criminal case whatever.—The 1 Ann. c. 9. enacts that witnesses for the prisoner shall be sworn, and under the equity of that statute, if I may say so, the courts have, in other criminal cases, awarded compulsory process; but they have considered themselves entitled to exercise their discretion as to granting attachments. I therefore broadly contend, that although in England the subject, when accused, may not have a right to compulsory process, yet in America the citizen has it secured to him by the highest authorities, the constitution and laws of congress: and I here claim the attachment as the right of my client.

The opposite counsel have endeavoured to entangle us by raising a distinction that we are not entitled to an attachment on a general affidavit. In answer to that objection, it may be observed that our affidavit is special, and states sufficient to show the importance of the testimony expected from those gentlemen. That topic I shall discuss at large, in arguing the motion for putting off the trial; but, postponing it until then, I shall here insist that we are entitled to have this motion granted, even on a general affidavit, and that it is not necessary to state any thing respecting the nature of the evidence they may give. An attachment is our right: the ordering of it must therefore be as much a matter of course, as the issuing of a subpœna. Were I to apply to the officer of the court for a subpœna, should I be stopped by an inquiry on his part, how far the witness was material? Certainly not: When I come then into this court, and ask for what is equally my right, and ought to be as much a matter of course, shall I be stopped by interrogatories, which it could be necessary to answer, only if I were applying for a writ, that the court might, in its discretion, either grant or refuse? We have shown that the witnesses

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have disobeyed the process of the court by non-attendance. With regard to them, subpœna is not a compulsory process, and we therefore ask, under the 6th article of the amendments of the constitution, and the 14th section of the judiciary act, for a process that will *compel* their attendance. This process, "agreeably to "the principles and usages of law," is an attachment; and an affidavit of the service of the subpœna, with the absence of the witness, without a sufficient excuse, is all that can be requisite for the success of our application.

The counsel on the other side have told us, that we are only entitled to a conditional rule in the first instance. If that should be the opinion of the court, it will only influence the manner of making out the order, and cause us to accept of a rule to show cause; it would make no difference to us, except so far as it might delay our trial; but, from the probability of that delay, arises an irresistible objection to a conditional order, that it would prevent a speedy trial. By the 6th article of the amendments to the constitution, already quoted, the accused shall enjoy the right to a speedy trial; for the purpose of which he shall have compulsory process to obtain the attendance of his witnesses. That process, then, ought to be modified, so as to be consistent with, and to procure a speedy trial. Here also, the authorities from the English law books become inapplicable, if the counsel for the prosecution are right in the position for which they have principally contended; because the granting of the attachment in that country, is, as they say, a matter of *discretion*; in America it is a matter of *right*; and surely those authorities that refer only to questions of discretion, can have no bearing on a question of constitutional right. If the process were only issued to vindicate the dignity of the court, it might proceed by slow degrees, and begin with a conditional rule; but there are not the same motives, nor is there the same power to interpose that delay between the right of the accused, to a speedy trial, and his right to compel the attendance of his witnesses. That dilatory rule is only authorised or required, where the matter to be ultimately decided upon, rests in the discretion of the court.

But it is said that we did not tender to the witnesses the necessary expenses; that we were five dollars short of the precise sum. Is this Mr. Madison's objection, or will he feel grateful to those who urge it on his behalf? I presume not, for he has expressly disclaimed it. The tender was twenty dollars in the first instance, and a further offer to pay all his expenses; and the affidavit of service states, that on this offer being made, the secretary of state replied, it was unnecessary saying any thing more on that subject; thereby undoubtedly waiving the benefit of an insufficiency in the tender, if under any circumstances, advantage could be taken of it.

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The truth, however, is that the objection would not avail them even in England. The cases cited by the opposite counsel are all in *civil* actions, and the necessity of tendering to witnesses their expenses, at the time of serving the subpœna, was created by the 5 Eliz. cap. 9. sec. 12. which relates only to such suits.—In criminal cases no tender was ever held to be necessary.

PATERSON, J. Is there not good reason for that, when the defendant would not be entitled to any process at all?

Emmet. The observation is certainly correct. The statute was passed when persons accused were in no case entitled to such process; and it could not be within the purview of the law, to make them tender money on service of a process, to which they were in no respect entitled. In criminal cases it is perfectly settled that witnesses are bound to attend. Hawk. Pleas of the Crown B. 2. ch. 46. sec. 173. is explicit on this point—"It "seems that in civil proceedings a witness is not obliged to attend, unless his expenses are tendered to him, pursuant to 5 "Eliz. c. 9. and if after such tender he neglect to appear, he "may be fined according to the directions of that statute, or punished by attachment for a contempt of the court, as the circumstances of the case shall appear to be. But in criminal proceedings the demands of public justice, supersede every consideration of private inconvenience; and witnesses are bound unconditionally, to attend the trial upon which they may be summoned, and be bound over to give their evidence."

PATERSON, J. You say that the defendant is entitled to compulsory process, as of right. Is there any statute of the United States, which makes the *tender* of expenses to the witness on the service of the subpœna necessary?

Emmet. I apprehend not; and in that respect there is a very manifest difference between the English and the United States' law. By the statute of Eliz. a *tender* is necessary from the express words of the act; and those words have regulated the decisions of the English courts. By the United States' act of the 28th February, 1799, sec. 6. (Grayd. Dig. 260.) a *compensation* to witnesses is regulated, at the rate of 5 cents a mile for travelling, and $1 25 cts. for every day's attendance in court. It struck me on reading that law, that those sums of money were to be paid to witnesses, as to jurors, by the United States, and not by the defendants; and on inquiring as to the practice, I find that the officers of the court are not agreed. On this point, therefore, the court must form its own conclusion. But from whatever quarter the compensation should come, jurors and witnesses are by the law put upon the same footing: Would a juror, when summoned, be permitted to say, I will not obey the process of the court, because I have no tender of my expenses? Certainly not. By what construction of the act, then, can that objection lie in the mouth of a witness?

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PATERSON, J. Has there been any decision under this statute on the ground of tender?

Emmet. I answer, perhaps without sufficient information, not—at least, not to my knowledge. But when I couple this law with the article in the amendments to the constitution, which says a witness *must* attend, I think he can claim no right to a previous tender of his expenses; but must perform the service of attending, and in case of non-payment, he becomes entitled to his action for the compensation.

Another question has been raised; it has been insinuated rather than explicitly expressed, by one of the counsel for the prosecution, that those witnesses could not be coerced to appear. If hereby is meant to be asserted any peculiar privilege of office, certainly, such claim cannot be made by Dr. Thornton or Mr. Wagner. Nor is there such a privilege attached to any of the offices held by the other witnesses. It is a strange doctrine in this free country, where the constitution and laws have accurately marked out the rights and privileges belonging to every office. Privileges of exemption from those duties to which every citizen is liable as such, must be clearly shown, and the law, by which they are authorised, must be produced.

PATERSON, J. You may save yourself the trouble of arguing that point; the witnesses may undoubtedly be compelled to appear.

Emmet. Another question has been stated; can the witnesses be compelled, or would they be authorised to disclose the secrets of state? No law-book that I have ever read or heard of, mentions such a privilege as belonging to public officers, though it is uniformly allowed to lawyers and attornies. But in this case another answer is also obvious. If the concurrence of the president in those matters, with which Col. Smith stands charged, be a secret of state, for the keeping of which there is a lawful privilege, it must be because such concurrence was within the legal sphere of the president's duties. If that be the case, let it be remembered, when I shall argue that the concurrence of the president would form a justification for my client; at present I shall urge it thus: if the concurrence of the president was within the legal sphere of his duties, the legality of his conduct will justify those who acted by his concurrence; of course, the court will help us to the utmost in availing ourselves of a legal and adequate defence; and will, at least, bring the witnesses into court, to try whether they will decline answering what if they do answer, must acquit us. On the other hand, if such concurrence be not within the legal sphere of the president's duty, then as to that, neither he nor the witnesses can have any legal privilege in right of his or their offices. Supposing the witnesses are not bound to divulge the secrets of government, let them, at least, declare whether there be

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any secrets of government connected with the measure for which Col. Smith stands indicted.

But it is also urged that the witnesses could not be forced to answer questions that might criminate themselves. No; but there is nothing in that argument that should prevent their being brought into court, to see whether they will make an objection which they certainly may waive. In truth, however, Col. Smith's affidavit does not lay us open to that argument; for it does not charge any one with approving of that expedition, but the president and secretary of state. Now, Mr. Madison may be called to prove the conduct of the president, and the other witnesses to prove the conduct of Mr. Madison.

PATERSON, J. Would Mr. Madison be liable to a prosecution, if he answered that the conduct of Col. Smith was with his knowledge, or knowledge and consent of the president?

Emmet. If the view I shall hereafter take of the statute be correct, he certainly would not.

Another circumstance has been mentioned; that those gentlemen have offered to be examined under a commission, and the court was pleased to express some surprise that such an arrangement had not been before thought of. With the utmost deference, I beg leave to answer, that the circumstance was adverted to; but neither the defendant nor his counsel are willing to accede to that arrangement. For my own part, I declare, that except upon some very extraordinary occasion, which I cannot now foresee, I never will consent to examine a witness under a commission in a criminal case, if his attendance on the trial can be forced. Even in civil causes, I have more than once had occasion to lament the inroads that are made upon oral testimony, by the increased use of written depositions; and I am convinced that the latter frequently prevent the discovery of truth. Every one knows, that when a witness is examined in open court, the manner in which he answers, and the manner in which he declines to answer, are matters of public observation; and that cross-examination may draw out more than could be obtained by studied and written answers to written interrogatories. It is the wish of my client that this case shall be made as clear as possible; that the truth shall be eviscerated and brought into public view; that the allegations of the defendant, and the testimony of the witnesses may be compared and judged of by the jury and the public.

The advantages of oral testimony over written depositions, are so strikingly set forth by Sir Matthew Hale, in his history of the common law, (vol. 2. ch. xii. p. 145.) that I shall beg leave to read a short extract from it; as, perhaps, if the same reasons were assigned by myself, they might be supposed to have some personal allusions.

"The excellency of this open course of evidence to the jury,

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" in presence of the judge, jury, parties and counsel, and even of " the adverse witnesses, appears in these particulars:

" 1st. That it is openly, and not in private before a commis- " sioner or two, and a couple of clerks; where oftentimes wit- " nesses will deliver that which they will be ashamed to testify " publicly.

" 2dly. That it is *ore tenus*, personally, and not in writing; " wherein oftentimes, yea too often, a crafty clerk, commission- " er or examiner, will make a witness speak what he truly never " meant, by dressing of it up in his own terms, phrases and ex- " pressions. Whereas, on the other hand, many times the very " manner of delivering testimony, will give a probable indication " whether the witness speaks truly or falsely. And by this means " also, he has an opportunity to correct, amend, or explain his tes- " timony, upon further questioning with him; which he can never " have, after a deposition is set down in writing.

" 3dly. That by this course of personal and open examination, " there is opportunity for all persons concerned, viz. the judge, " or any of the jury or parties, or their counsel or attornies, to pro- " pound occasional questions, which beats and boults out the truth " much better, than when the witness only delivers a formal se- " ries of his knowledge without being interrogated. And on the " other side, preparatory, limited, and formal interrogatories in " writing, preclude this way of occasional interrogations; and the " best method of searching and sifting out the truth, is choaked " and suppressed.

" 4thly. Also by this personal appearance and testimony of " witnesses, there is opportunity of confronting the adverse wit- " nesses; of observing the contradiction of witnesses, sometimes " of the same side; and by this means great opportunities are " gained, for the true and clear discovery of the truth.

" 5thly. And further, the very quality, carriage, age, condition, " and place of commorance of the witnesses, are by this means, " plainly and evidently set forth to the court and the jury; where- " by the judge and jurors may have full information of them; and " the jurors, as they see cause, may give the more or less credit " to their testimony."

There is another objection to taking the depositions of witnesses by commission in criminal cases, which I think irresistible; if the witnesses swear falsely, how are they to be indicted for perjury? In urging this argument, I can have no allusion to the witnesses, who have offered to be thus examined; but this case is so conspicuous and important, that every part of its proceedings may hereafter become a precedent; and in this case the precedent might give rise to a very dangerous practice. I therefore feel that I should not only be doing injustice to my client, but also injury to the general administration of justice, if I consented

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to any other mode of taking the testimony of those gentlemen than *viva voce* before the jury.

We come now to the most important question; the materiality of the testimony expected from those witnesses. So far as relates to the attachment, I trust I have already convinced the court, that it ought to be laid out of consideration; *that* process being a matter of right. The witnesses are in contempt; when they come forward to purge themselves of that contempt, then and not before, ought the nature of their evidence to be taken into consideration. I deem it, however, to be the most important of all questions raised in this cause; since the counsel for the prosecution resist our application to put off the trial, on their allegation that the testimony is immaterial. The remainder of my observations shall therefore, be directed to the support of that application.

The facts, which we hope to prove by those witnesses, are very material, either for a complete defence or for mitigation of punishment; and in either case we have a right to ask for compulsory process to bring them into court, and for the postponement of the trial till they do come. It cannot be expected of us that we should, in this stage of the proceedings, disclose our defence, and give the opposite side advantage of a detailed argument upon the application of our evidence. We shall do enough, if we show by a general view of the subject, that those facts may be applicable to our case either in justification or in mitigation of punishment.

First as to justification. The purport of a constitution, is to define the duties of the constituted authorities, to prevent their usurpations or collisions, and to limit the powers of public officers, in order to protect the people from their encroachments. It seems to me, therefore, that the fair construction of our constitution, as to the right of declaring war, is that the executive shall be controuled, and deprived of that baneful prerogative, which is exercised by the chief magistrate of England. If the president undertake to declare war, he becomes undoubtedly and justly liable to impeachment; but it is too harsh a construction of the constitution, to say that it has any reference to the conduct of an individual acting *bona fide* under the president, and by his authority, in times and circumstances such as those when general Miranda's expedition was set on foot. No subordinate officer or private person acting by the president's authority, falls within the purview of the constitution, or becomes criminal, unless by knowingly and intentionally assisting to violate its provisions, he should involve himself in the guilt of his principal. Where, therefore, the situation of the country affords a reasonable ground for supposing that a war with some foreign power, may speedily break out, I submit that the subordinate agent, who, with the knowledge and under the directions of the president, provides or prepares the means for a military enterprise against that power, stands acquitted, and that if there has been any misconduct, it must be answered for by the

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superior officer alone. Who is to be the organ of congress, if secret preparations for war shall have been decided upon? Undoubtedly the executive. Suppose then the head of the war department, by the desire of the president, should write to any contractor or subordinate officer to provide a million of cannon balls, or any of the other things necessary for a military expedition, while congress were sitting with closed doors, deliberating upon an avowedly hostile message, sent them by the president; would the contractor come under the penalties of the law, if he accepted and executed the contract, and thereby provided and prepared the means for a military expedition? Or should he say, I will not execute the contract, or the inferior officer, I will not obey your orders; for I do not know that you have the sanction of congress, as they are still sitting in secret deliberation? I venture to assert that a more unwise or injudicious construction could not be given to the constitution, than to say that it prohibits a subordinate officer from paying obedience to the orders of his superior, or that the commands of the president would not be to him a sufficient justification of his conduct under all the circumstances of the case.

Spain had committed depredations on our territory: the message of the president details the particulars and recommends a hostile attitude; congress sit with closed doors to discuss the question. To whom then should the people at large look for information or guidance, but to the president? Is it not competent to congress to decide secretly on the propriety of anticipating an enemy before he has matured his strength? If they should so determine to declare war, would they not naturally authorise the president to take all necessary steps for attack or defence, unknown to Spain? A citizen residing distant from the seat of government, can only know such facts as are public; he is not likely to have direct communication as to the secret objects of the cabinet or congress. But when he sees that Spain has commenced hostilities against us, and finds that the president has recommended war, on which the two houses are deliberating in secret; when at the same time he receives satisfactory assurances that he has the approbation of the executive, shall he be culpable if he acts on those views and on that authority?

Here I am met by an objection, that colonel Smithis does not lay any foundation for supposing this to be the state of the country; nor does he swear that he expects to prove those facts by these witnesses. To that I answer, that perhaps we may question them as to those facts; but we do not complain of want of testimony on that subject; we may prove it by other means; I see a very venerable* witness in court, by whom we can certainly prove the state of the country.

* The Vice-President.

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It is not necessary to specify in the affidavit, more than we expect and want from those witnesses; it never yet was required of an accused, that he should disclose, on a motion of this kind, all the particulars of his defence, and how each fact is to be proved. In this state of the cause, we may well assume circumstances of public notoriety, and couple them with those we wish to prove by the witnesses, in order to see whether the whole together will not make a justification.

The argument which I have hitherto urged from the state of the country, acquires infinitely more force, when you consider the precise charge in the indictment, which is framed pursuant to the statute, for *setting on foot, providing and preparing* the means for a military expedition or enterprise.

PATERSON, J. What are the words of the statute?

Emmet read from Graydon's Dig. p. 70. the 5th section of the act of 5th of June 1794, "If any person shall, within the territory "or jurisdiction of the United States, begin or set on foot, or "provide or prepare the means for any military expedition or "enterprise to be carried on from thence, against the territory "or dominions of any foreign prince or state, with whom the "United States are at peace, every such person so offending "shall," &c.

It appears then, that the indictment and statute are only pointed against *preparatory* acts for carrying on an enterprise against a power at peace. Will the counsel for the prosecution offer evidence of the sailing of the Leander, or of any act of hostility? If they do, it must be in order to lay matter of aggravation before the jury, and let them consider how far that is consistent with their denial of our right, to prove matter of mitigation in the same way. But as to the acts charged in the indictment, they are only preparatory and independent of any actual hostility. As to them, the state of the country forms an irresistible justification both of colonel Smith and of the president. The constitution indeed does not allow the latter to declare war; but does it forbid his providing and preparing the means of carrying it on, while congress are in actual and secret deliberation whether *they* shall declare war, against a nation that is committing and provoking hostilities? Spain, indeed was technically at peace by the treaty of San Lorenzo, but she was actually at war by the law of nations; she had broken that treaty, plundered our ships, invaded our territories, and carried our citizens from thence as prisoners by military force. Such a nation is not entitled, if I may say so, to the benefits of this act, the object of which is, that so long as any prince or potentate shall act towards us with perfect amity, and not by equivocal or unfriendly conduct, render preparatory measures for war advisable, so long it shall be forbidden under the penalties of this law, to any individuals to break that amity, and by unauthorised acts to endanger the peace of the two coun-

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tries. But if the foreign power, shall itself have broken that amity, and shall have given just grounds of war, no government ought to omit "providing and preparing the means" for military enterprises; nor could any law have intended to prevent the preparatory efforts of individuals for subduing the public enemy.—The memorable congress that commenced your revolution did not hesitate to provide and prepare the means of meeting the English before actual war was declared; nor did it censure or discountenance those patriots, who, unauthorised by any orders, and before the formal declaration of war, possessed themselves of Ticonderoga and Crown Point.

The circumstances of the times, we have shown, justified the president in giving his approbation, and my client, under that approbation, in providing and preparing the means of a military enterprise against Spain. And surely no enterprise could be more useful or effectual for drawing the enemy from our southern and western frontiers; none more worthy of the exalted and philosophic mind of our chief magistrate; none more consonant to the enlightened and philosophic views of society and politics, which he has exhibited to the world, than an expedition to liberate South America; to destroy at once Spanish tyranny and power on our own continent; to enfranchise, by one effort, millions of our fellow creatures from the most frightful bondage; and to lay the foundations, in so large a portion of the globe, for the freedom and the happiness of man!

PATERSON, J. You state in the affidavit that it was done with the knowledge and approbation of the president, but is it stated in the affidavit that he *authorised* the fitting out of the expedition?

Emmet. I conceive it was not necessary; for though I have argued upon the effects of an authorisation, it was only to show that the argument of the adverse counsel went much too far, when they contended that the president could not authorise any such measure. For our defence, it will be only necessary to show that the president was, under the circumstances of the times, warranted to provide and prepare the means for a military expedition; and that in what he might do, we acted with his knowledge and approbation. *Qui prohibere potest et non prohibet, jubet.* The knowledge and approbation of the chief magistrate and heads of departments, if we shall prove them to have been sufficiently express and positive, will amount to a justification; but even if we should fail in establishing them to that extent, they will still afford very powerful inducements for mitigating the punishment.

This is denied on the other side; but I would ask, if it could be proved that this enterprise was carried on *against* the president's express order, would not that be matter of aggravation? If it would, surely the reverse must be matter of mitigation.—The mistake, into which a defendant may have been led by the

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approbation of the government, and the innocence of his motives must surely mitigate a discretionary punishment. In this case we do not rely upon a mere general and vague approbation of the measure; we shall show that approbation was given to this very defendant's being concerned in it.

We are told, however, that no evidence, which only goes in mitigation of punishment, should be laid before a jury; but that it is only cognisable by the judge, who is to apportion the punishment, and that therefore the want of it forms no ground for putting off the trial. This doctrine, permit me to say, is contrary to every day's experience; for who, that has attended the commonest trials for assault and battery, does not know that all matters connected with the crime, though not making any part of the issue, whether they preceded, accompanied or followed the fact charged, are given in evidence on the trial, and that the judge, after hearing those matters, varies his sentence, according to the case, from perhaps one cent to a very exemplary fine and imprisonment. But what reporters can we quote on this subject? I verily believe that no lawyer, who ever undertook to report a case, thought this a matter of sufficient difficulty or importance to be worth noting. It happens, however, that we can cite a printed case in which the point has been decided, and that only, because the trial having been taken verbatim, the most insignificant circumstances attending it have been preserved. The case I allude to is that of the earl of Anglesea, in the 9th State Trials, p. 335. There, although it was resisted by the defendant's counsel, the counsel for the prosecution stated and proved matter of aggravation, entirely distinct from the assault on which the indictment was framed; and the court considered his right of doing so as unquestionable. It has been asserted on the other side, that the facts stated, accompanied the assault, and therefore were necessarily admitted; but if so, how came the defendant's counsel to resist their introduction? On looking into the case the court will find those facts, which were introduced for the purpose of aggravation, happened the two days preceding the assault. A distinction is also taken, that what was there stated, was in aggravation, and that what we wish to introduce before the jury, is in mitigation of punishment. What principle of law sanctions this distinction? Those who have a right to hear the one surely have a right to hear the other. Unfortunately also it seems contrary to the case of the King v. J. Mockler, 1 M'Nally's Rules of Evidence, p. 320. where Downes, justice, admitted evidence of character *on the trial* for uttering counterfeit coin; *as the punishment was not certain, but discretionary in the court.*

But the counsel on the other side maintain, that such evidence must have been received to meet the issue of not guilty; it being very unlikely that a person of good character would be guilty of such a crime. To this surmise, the answer is obvious; *that*

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was not the reason assigned by the court. It happens also that I was concerned in that cause for the defendant, and have such a recollection of it, as enables me to show the learned counsel's supposition to be groundless. The fact was clearly proved and indeed admitted; but the defence was, that the defendant was a silver-smith, and made out of pure metal, shillings which were rather more valuable than the current coin, which by being worn down was not worth more than nine pence, and of which there was an actual scarcity. This certainly formed no legal defence; but on its being proved that the counterfeit was as good as the current coin, the judge admitted evidence of character, not to controvert the guilt, which was unquestionable; but that it might be considered in mitigation of punishment.

The Chevalier D'Eon's case (3 Burr. 1513) is very much relied on by the opposite side, as proving that evidence in mitigation should not be received on the trial; but that it should be laid before the judge, after verdict, by affidavit; and that the want of it forms no ground for putting off the trial. Let us, therefore, shortly examine that case. The first position is supported, as the counsel think, by this expression of Lord Mansfield: "If "their knowledge relates to any circumstances that may serve "to mitigate the punishment, in case he should be convicted, "*that* sort of evidence will not come too late after conviction of "the offence, and may be laid before the court by affidavits." True, it will not come *too late* after conviction; but has his lordship said that it would come *too soon* before verdict? True, it *may* be laid before the court by affidavits; but has his lordship said that it *ought not* to be laid before the court *viva voce*, on the trial? That sentence, however, has been misconceived by the learned counsel; it only refers to the peculiar circumstances of D'Eon's case, and does not purport to lay down any general principles whatsoever. This will instantly appear by comparing the report of the same case, in Sir W. Blackst. 510. with that in Burrows. The motion was made in *Trinity* term; the trial could not take place till after that term; and, as it was an information, judgment could not be given till the November or Michaelmas term; and Mr. Morton and Mr. Ashhurst argued, I confess, I think unanswerably, for putting off the trial, that it could not, at the utmost, cause above eight days' delay as to the sentence, if the defendant should be ultimately convicted. Lord Mansfield, however, said in substance, your witnesses are out of our jurisdiction in France, and it is not either in your power or ours to compel their attendance; but you expect them here, you say, next term; they will therefore come, if at all, before sentence; and as they can be only in mitigation (this being an information for a libel, which admits of no justification) you can still have the benefit of their testimony, though they should not be present on the trial; *their evidence will not come too late next term (when you expect*

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them) after your conviction, and you can lay it before the court by affidavit. This is the true explanation of that sentence on which the opposite counsel so much rely; and permit me to observe upon that case, even were it more favourable for them than in reality it is, that, since truth is settled to be an inadmissible justification on an indictment for a libel, it is manifest the exclusion of those witnesses on the trial of the issue, worked an injustice to the defendant. Indeed, any one who now examines that decision with impartiality, will, I think, be convinced that the defendant was very hardly dealt with; and, what surely will not recommend the precedent to this court, it appears from 1 Sir Wm. Blackst. 517. as if this hard treatment sprung from a spirit of complaisance to certain foreign ministers.

The case, however, affords no ground for arguing, that matter in mitigation of punishment should not be given in evidence on the trial—and every day's experience shows that it may. Even for the information of the judge, if he alone is to take cognizance of the testimony, it is adviseable that he should be informed by *viva voce* examination, which is superior to written affidavits, and which affords the advantage of sifting out the truth by pointed and cross examination. Besides, if we are not allowed compulsory process for enforcing the attendance of those witnesses before the jury, and a postponement of the trial till they can be brought into court, by what process or authority of law are we to obtain their affidavits in mitigation of punishment? I know of no process, by which you can compel any man to swear an affidavit: and here, let me observe, that in the Chevalier D'Eon's case, his witnesses he admitted were friendly, and were willing to be examined—there was therefore no danger but that he could procure their affidavits after conviction. Col. Smith does not pretend that his witnesses are friendly, or willing to be examined—How then, I again ask, if this trial should not be postponed until the attendance of the witnesses can be enforced and their evidence obtained under a compulsory process, is the defendant to procure those affidavits, which might be laid before the court, and ought to diminish the punishment?

Besides, it is the right of the jury to recommend to mercy; and how can they do so, if no extenuating circumstances are permitted to reach their ears? The president's approbation and knowledge are facts, which, like most other facts, may be contested, and upon which, therefore, the court entertain some doubts. Would not the recommendation of the jury, finding those facts and grounded on their declared belief of them, have infinite weight in removing the doubts of the court and influencing its conduct? Indeed, from every view I can take of the subject, I am convinced that the original and correct mode of receiving any testimony, whether to the issue, or in aggravation or mitigation of punishment, was *viva voce* on the trial; and that the introduction of affi-

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davits after conviction, is a modern and irregular invention, tolerated for the convenience of the defendant, to whose benefit it has hitherto been most frequently applied: but I confess I am surprised to hear it argued, that the innovation should totally supersede the ancient, and I think the wisest practice.

Another reason for putting off the trial, presents itself from an examination of D'Eon's case coupled with Col. Smith's affidavit. In that case, the defendant gave some reason to believe that the witnesses were prevented from attending by the interference of the prosecutor; and Mr. Justice Wilmot declared (1. S. W. Bl. Rep. p. 516) that if *that* were clearly established, he should be for putting off the trial for ever. In this case, Col. Smith swears that he believes those witnesses are prevented from attending by the interference of the president, who has directed this prosecution. The fact is not denied, and what might be a justification of the fact, is not sworn to. Upon that ground, which is admitted to exist with us, and which Lord Mansfield said in D'Eon's case (3 Burr. 1515) would be sufficient for putting off the trial, till the witnesses could be had, we ask, even if you should be against us on the other points, that the trial may be postponed.

I have trespassed so long on the time of the court, and on the debilitated health of one of its members, that I know not what apology to offer—I shall not encrease my offence by any longer intrusion, except to return my thanks for your very patient and favourable attention.

Harison. I am now to close the argument on the part of the defendant, and to offer my sentiments upon a subject that is nearly exhausted. A sense of the duty I owe to my client, and a regard to public justice are the motives by which I am influenced and which I hope will apologize for observations that may appear to be superfluous, and perhaps have been already offered.

Before, however, I proceed to the main questions that have arisen, I beg leave to advert to an observation which fell from the counsel for the prosecution. He indeed declared our form of government to be the best in the universe; in the preservation of which every citizen was of course deeply interested. And yet, he expressed great surprise that a prosecution such as this, which he considered as of a very *ordinary* nature, should bring together so numerous an assembly, and excite such universal interest and attention. Perhaps this observation might have been spared; for without adverting to the previous proceedings in this case, the nature of the prosecution, and the high authority by which it was instituted, would sufficiently account for the effects it has produced. For my own part, believing the criminal system of the United States to be the most pure and chaste and mild and perfect that the world ever beheld, in fact, I consider it as a most valuable inheritance belonging to the citizen. It has therefore called forth the public attention; and the numerous audience that is assembled up-

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on this occasion, must be considered as an expression of its sentiment. The remarks which I have made upon the criminal institutions of the United States, and to which I shall hereafter allude, will I trust be found not wholly inapplicable to the cause before the court. I proceed to discuss the questions in the order that they have been stated. The first is whether an attachment should issue for the non-attendance of the witnesses.

Here I observe that according to the mild system of our laws, the innocence of the defendant is always to be presumed until the contrary appears. The public has an interest in guarding the innocent, at least equal to that of punishing the guilty. It is, indeed, our first duty to protect innocence; and hence, the very constitution of this country has provided that the accused shall have the necessary means of defence; among which compulsory process for his witnesses is expressly included. This is a provision of great importance, and distinguishes our criminal code from that of other nations. In the origin of the English law no witness was to be examined for the prisoner, at least not upon oath; though by a modern statute, a different regulation has been introduced; and by a favourable construction of that statute, the prisoner has been held entitled to process against his witnesses. In our country, however, this matter has not been left to construction; nor does it depend upon legislative pleasure. It is a fundamental article of the constitution, which imparts a right to the accused, that he cannot be deprived of, and which courts of justice are bound to protect.

It is not pretended that the peculiar character and situation of the witnesses, exempt them in this case from the duty of attendance. Public officers, however dignified, are not excused from appearing to vindicate innocence. Our law contains no dispensation from this duty. The defendant has a right to the benefit of their evidence; and the court is bound to secure a right so essential to the complete protection of life, liberty and property. If, therefore, this right exists in the defendant to prove his innocence, there must exist a power to compel the attendance of reluctant witnesses; otherwise the right would be nugatory, and it would be in the option of the witnesses to defeat the provisions of the constitution.

It is always to be remembered that at the last term affidavits were produced to show that the witnesses were necessary to our defence. The court then directed subpœnas to be issued, and the trial to be deferred. The due service of the subpœnas has been fully proved, and the defendant has complied with every thing that was requisite on his part. Why then shall the attendance of the witnesses not be procured? It is said that they have written a letter to the court, stating their excuse. But I may ask whether such a letter can be considered as a legal apology. If the witnesses had any excuse to offer, it should have been presented in

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another shape. The court certainly can pay no attention to this document; for though in one instance the rescript or letter of a British king was received as evidence, yet this was always considered as an improper proceeding, and not as a legal precedent. Even in England, therefore, a mere letter would not be thought worthy of notice; and in this country neither the president nor any other officer, can be heard in a court of justice, to exculpate himself from a contempt, unless upon oath.

I go on to remark that whatever might be the practice of English courts as to enforcing the attendance of witnesses, the power and the duty of the American courts would not be affected by it. I might therefore be silent as to this head of the argument; but lest the court should think it of importance, I shall bestow some few minutes to its consideration. The counsel for the prosecution have supposed that attachments against witnesses for contempt in non-attendance, owed their origin to the statute of Elizabeth, and that they did not exist at common law.

On the contrary, the passage from Blackstone which has been quoted, shows that from the earliest ages of the law, the superior courts of justice have used the method of punishing contempts by attachment. Contempts committed by witnesses "by making "default when summoned, refusing to be sworn, or examined, "or prevaricating in their evidence when sworn," have, according to the learned commentator, always been punished in this manner. Attachments in such cases are therefore as ancient as the laws themselves; and did not, as the counsel for the prosecution contend, grow out of the statute of Elizabeth. If so, all the fabric which those gentlemen have endeavoured to raise upon this foundation, must inevitably fall to the ground.

It is true, as they have stated, that Lord Chief Justice Lee is made in one case to say that "attachments are a new practice; "that he remembered the first motion for them." But there must be some mistake in this reporter; for it is laid down in a case mentioned in Lilly's Register, that an attachment may be granted against witnesses for their non-attendance, and this is said in a case which took place long before the period, to which the memory of Lord Chief Justice Lee could have extended.*

Besides, the authority of Lord Mansfield in the case cited from Douglas, is at variance with the assertions of the learned counsel. His Lordship says "the courts of Westminster-Hall, most "clearly now (and they *also* did *so before the statute*) proceed "against witnesses who wilfully absent themselves, as for a con-"tempt." Thus, therefore, Lord Mansfield, according to Dou-

* The case in 1 L. P. Reg. 162, is said to have taken place in 1655. The *dictum* of Lord Chief Justice Lee, was in 1748; but perhaps he spoke of an attachment in civil causes. It is most probable they had in such cases fallen into disuse after the statute, when the remedy by action may have been preferred, at least for some time.

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glas, one of the most eminent reporters of the English bar, is at variance with the counsel for the prosecution. The court must determine as to which it is probable should be mistaken.

But the gentlemen for the prosecution say, that if we are entitled to any thing, it would be only to a rule against the witnesses to show cause; and if this was all the dispute between us, it would be of little consequence whether in the first instance the attachment should be granted, or a rule to show cause why it should not be issued. The cases however which they have quoted respecting this matter are, except one, in civil causes.—The only one of a criminal kind, in which the question arose, and which is in the 7th Term Reports, is a case where the court doubted their authority to have originally issued the subpœna.—They therefore granted a rule to show cause in the first instance, that the parties might argue *that* point if they thought proper; and being satisfied upon it, the attachment was finally issued, the rule being made absolute, and Lord Kenyon saying that the application was warranted by precedent. It will be seen too, that in the cause cited in the notes to that case, the court of King's Bench had, without any question, issued an attachment in a criminal case in the first instance. So that from authority, and from reason, upon the principles of the common law, and on precedents from time immemorial, it appears that courts possess a right to enforce obedience to their precepts by process of attachment.

Here Judge PATERSON asked whether this power of punishing contempts, was not incident to courts of justice; and upon the counsel's replying that it certainly was, according to the scope of his argument, the judge observed that he had always considered it so.

Mr. *Harison* then proceeded in the following manner:

Taking it then for granted (which perhaps no man of legal information could have doubted) that the power to punish contempts is, by the principles of the common law, inherent in every superior court, and that process of attachment is to be resorted to for that purpose, it will follow that unless the witnesses are entitled to exemption from the general rule on account of their official characters, attachments ought to be granted. But any objection on that ground is disclaimed, and would not be tenable.

It is nevertheless objected that the attendance of these witnesses ought not to be enforced, because the nature of the evidence expected from them, is such as would criminate themselves. I shall certainly not attempt to invalidate the maxim, "that no one "is bound to inculpate himself." It is too well established, and too sacred in its nature, to admit of a dispute. The court will, in every instance, secure to the witnesses the benefit of the rule; and for that purpose will examine the interrogatories that may be put to them, and even have the questions reduced to writing

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for the sake of precision. But then the court will never pre-judge the question in this state of the business, when it cannot appear that the testimony of the witnesses, will of necessity inculpate themselves. For, granting that the participation of the president and great officers of state in Miranda's enterprise is to be established by the evidence, still no man need be called upon as a witness to accuse himself. Mr. Madison might speak only as to what relates to the president, and other members of the administration; and they again might be examined with the like qualification of not being called upon to accuse themselves. At present, the court cannot determine for the witnesses, whether they will, or will not insist upon the privilege of not answering to those things which would involve their own crimination. It is a privilege which the law has conferred for their benefit; and which, in the course of examination, they might think proper to renounce; since, according to the legal maxim, "*Quisquis renuntiare potest juri pro se introducto.*" At any rate, they are not for themselves to judge that they can give no evidence which the court would receive or compel; but they must come in person, and submit themselves to the judgment of the court upon the questions as they arise.

One other objection has been taken to the issuing of an attachment in this case, flowing from the supposed deficiency of the tender made to Mr. Madison for his expenses. But it is obvious that he had waived the objection; and he would, probably, have disdained as a subterfuge, what the legal ingenuity of learned counsel has pleaded in his excuse. Indeed, the constitution has directed, that the accused shall in all cases have compulsory process for his witnesses, and it is silent with regard to defraying their expenses. If this should be deemed necessary to secure their attendance, the poor (though innocent) might lose the benefit of this provision. Such a construction of the constitution, certainly will not be adopted; and, if I am not misinformed, a contrary doctrine has received the sanction of the judges, in one of the courts of the United States. It should also be considered that in civil cases, a party injured by the non-attendance of witnesses, may have some reparation from the recovery of damages. But in criminal cases, such remedy would be wholly inadequate, even if it could be obtained by any legal proceeding. We trust, therefore, that the court will grant our motion for an attachment.

I now proceed to the second, and perhaps more important question, whether the trial should be deferred until the attendance of the witnesses can be enforced. If the principles which I have alluded to as to the rights of the accused, are correct, and that the most dignified characters in the union are obliged to attend for the protection of innocence; then even the president himself, who sustains the most exalted character upon earth, that of the

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chief magistrate of a free people, clothed as he is with great constitutional privileges, and bound to the most important duties, vested with the whole executive power, and considered as the common parent of the American people, might probably be required to attend the trial, if his evidence was requisite for our defence. But it is not necessary for us at present to insist upon this position; we ask only for the attendance of his ministers; and though perhaps it may not be reasonable that they should be dragged from one end of the continent to another upon light and trivial occasions, yet if affairs of state and their important avocations, are at all times to shield them from attendance, our best and dearest interests may be put in jeopardy, and the means of protecting innocence totally fail. In all these cases, I take it, the court will inquire into the nature of the evidence, and see whether it is relevant to the cause to be tried. We contend that the evidence is relevant, whether it goes in justification of the defendant, or in mitigation of the crime. If in justification of the defendant, then it is admitted that it would be proper to defer the trial. This, therefore, is the first subject for our consideration; and it will depend upon the question whether the defendant will be justified in a participation in Miranda's enterprise, by the president and chief officers of the administration having known and approved of the plan.

The gentlemen concerned for the prosecution, tell us that the constitution has invested congress alone with the power of declaring war; and that even the positive orders of the president (much less his knowledge or approbation) would be no justification for the defendant.

We admit, indeed, this constitutional provision; but on our part, we contend that actual war may exist without any declaration. The necessity of a declaration to the existence of a public war has, indeed, sometimes been insisted upon; but is contrary to the doctrine of Grotius, Bynkershoek and other approved writers. Hostilities committed by the public authority of one government against another, must certainly create a state of war, independent of any declaration; and a state of actual war subsisting between Spain and the United States, would be a justification to the defendant upon this indictment.

Besides, by the constitution of the United States, the supreme executive power is vested in the president; and it is the presumption of law that this high and responsible officer will perform his duty. The citizen, therefore, when he acts with the knowledge and approbation of the president must stand justified, unless the case is such as could not, upon any construction, fall within his legal powers. Confidence is to be reposed in the magistrate at the head of public affairs, and though the president might be punishable by impeachment or otherwise for his misconduct, the

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private citizen should be safe when acting under the authority of the executive.

If actual war, therefore, may exist without a declaration, and without the concurrence of congress, then I would ask, whether the supreme executive power would not be justified in directing hostilities against the enemy? Suppose, for instance, that the British government should commence an actual warfare against us, and meditate aggressions from the province of Lower Canada, would not the president be justified in making an immediate diversion in another quarter, though no actual invasion had taken place, if he could thus defeat the design of the enemy? Or would it in such case be necessary for him to convene congress and obtain a declaration of war, when in the interim our territories might be invaded, and irreparable mischief done to our citizens and their possessions? Suppose, again, that a military expedition against the more distant territories of Spain should be found necessary, to prevent an attack by them upon our south-western frontier, would it not be competent for the president to direct such an expedition in a case that would not admit of delay? The authority of the president in such circumstances may not indeed be given by the express terms of the constitution; but it is virtually implied and contained in the supreme executive power with which he is invested—a power which, in all governments of every form, must sometimes act upon its responsibility for the protection of the public, even where no express power is delegated. When it neglects this high duty, it becomes an object of scorn; and for the performance of it, if the president should even exceed the bounds of express constitutional power, he would rise to a fault which his country would applaud, and which the rest of the world could not censure.

If there are cases then in which actual war may exist without a declaration of it by congress, (and unless I have been misinformed, the case of Tripoli was originally such) then there may be cases in which the president may lawfully order, or approve of military enterprises without the sanction of congress. Now, if such cases can exist, the present is perhaps a case containing all the circumstances which would justify the president in the exertion of extraordinary powers. The situation of the two countries was in reality a state of war, as we expect to show from the message of the president and the proceedings of congress. It was right in the president to attack the enemy in his most vulnerable part; and the fitting out of the expedition under Miranda, if done with the knowledge and approbation of the president, was highly meritorious. For as the indictment charges the defendant with preparing the means for a military expedition; and as military enterprises are within the proper province of the president's authority, if he approved of the expedition, (as we say he did) then the defendant stands justified. A private citizen,

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acting with the approbation of the executive, in a military expedition against the enemy, wants no other justification. He is not presumed to know the secrets of state, which belong to the president and his ministers. When they approve of the expedition, as Col. Smith says they did in this instance, it must be presumed legal; and all military enterprises would be delayed and rendered precarious, if the officer was to wait for legal explanations, or acts of congress, before he complied with the wishes of the executive power. I have already said that the president is to be considered as the parent of the American family. As such, he was bound to warn them against the commission of any criminal proceedings that came to his knowledge, and he could not neglect to do so, without a violation of his duty. Even if this was doubtful upon general principles, the act of congress, upon which the indictment is framed, enjoins him to prevent the commission of the offences therein mentioned. Consequently, the presumption of the legality of those expeditions which he approved, would be strengthened by the consideration that it was expressly made his duty to prevent them, when they came to his knowledge, unless they were against an enemy. The private citizen, therefore, must be justified under the circumstances stated, when he undertakes to forward an expedition, which has been approved by the president.

I proceed now to the next branch of the argument. If the evidence required will not justify the defendant, does it go in mitigation of his defence, and ought the trial to be deferred upon this account?

Here, if we suppose that every citizen undertakes a military expedition upon his own risk, and that he cannot be justified by the mere approbation which the president may have bestowed upon the enterprise; still, as the punishment is discretionary, the motives of the defendant should be inquired into, and all the circumstances which tend to show that he acted from no improper or wicked design, should be admitted to alleviate the offence.

One of the greatest orators and lawyers of the present age, when speaking of the English criminal law, says that it is "the "purest, the noblest, the chastest system of distributive justice, "that was ever venerated by the wise, or perverted by the foolish, "or that the children of men in any age, or climate of the world "have ever yet beheld." This is indeed a very great and striking elogium; but perhaps more applicable to our criminal system, than to that of England. We have moderated the unreasonable severity of their code, and made the protection of the accused more peculiarly our care, at the same time that we have preserved every thing that was good and valuable in their system. Thinking therefore, as I do, of the criminal system of this country, and supposing it entitled to all the praise which Mr. Curran has given to that of England, I cannot believe that it can be so de-

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fective as to trust a discretionary punishment of offences, to the court, according to the circumstances of the case; and yet not supply the means to the accused of manifesting those circumstances upon the trial. If our system is perfect, it must proportion punishments to the offences, and will not consider the stain to be equal when the whole body is clothed with corruption, and when the spot is so small that the microscopic eye can scarcely discover it. The difference of offence must necessarily imply a difference of punishment, and this again implies an examination of all circumstances, which must be had, according to the language of the poet,

"*Ne scutica dignum, horribili sectere flagello.*"

But this examination can never take place, if the evidence, which goes in mitigation, the evidence, which shews the real motives of the defendant, and the circumstances of the case, is excluded from the trial. The defendant, if he has a right to justice, has a right to acquittal if innocent; and if guilty, to show what was the precise extent of his offence, that he may be punished accordingly. It is in vain to say that evidence in mitigation may be received by affidavit after the trial. For this is a novel practice, permitted by the indulgence of the courts, where the regular time for offering the evidence has elapsed. There is no compulsory method to oblige witnesses to make these affidavits. If they are so disposed they may indeed do it; but they may also refuse if they think proper; and thus if the doctrine contended for on the part of the prosecution, is to prevail, there will arise this legal solecism, that the defendant shall have a right to be judged according to the degree of his guilt, and yet shall possess no legal means to ascertain that degree, by an explanation of his motives or other circumstances, which, though not amounting to a justification, may fix the relative malignity of the crime.

It is said indeed, that this kind of evidence can only serve to mislead the jury; but I ask, by what kind of logic is it permitted to the public accuser, to produce all the evidence that will go in aggravation of the crime, (whatever may be its effect upon the mind of the jury) and to exclude all that would tend to mitigate the offence, even where there is no other certain way of bringing it before the court, except upon the trial? If this is really to be considered as the law of our country, then is our boasted system of criminal law miserably defective in a most important point. We have shown to the court, by the case of lord Anglesea, that the public prosecutor was suffered to give evidence in aggravation, because "the fine which the court was to impose was discretionary, and would be greater or less in proportion to the nature of the offence; and therefore, every thing was proper to be laid before the court that might be an ingredient in their consideration for the imposing that fine." And surely, if this was

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a reason for giving evidence in aggravation, the same reason would legalize evidence in mitigation of the offence.

The counsel for the prosecution upon this part of the argument, seem to rely upon the case of the Chevalier D'Eon as reported by Burrows, first, to show that evidence in mitigation comes properly after the trial; and secondly, that the want of it is no reason for postponement.

On our part it is admitted, that the case in Burrows is law, and whenever a case similar to it shall arise, it ought to govern. But it was a case, the circumstances of which were extraordinary, and from which no conclusion can be drawn to affect the present. In the first place, no process whatever could there reach the witnesses, and if they gave evidence at all, it must be because they were well affected towards the defendant, and willing to testify on his behalf. If, therefore, they were expected to come voluntarily as witnesses to the trial, they would also voluntarily make affidavits in mitigation of the offence, if they could do so with propriety. In both cases they could not be affected by the process of the court; and their conduct depended upon their volition. So that the defendant lost nothing by their non-attendance upon the trial.

Again, it is observable, that Lord Mansfield says their evidence, if in mitigation, *may* be received after the trial. But his Lordship does not say that evidence in mitigation could not be received upon the trial. And if it could not, why enter into all the other reasoning, when this at once would have been a conclusive argument?

Granting, therefore, that where the witnesses are beyond the reach of process from the court; where their evidence will be merely in mitigation, and where, if they attend at all, it must proceed from their own good will, that the trial ought not to be deferred for their non-attendance, (which is all that the case from Burrows establishes) we cannot draw the consequence either that evidence in mitigation could not be heard upon the trial, or that, if the witnesses were under the controul of the court, and ill affected towards the defendant, the court would not defer the trial to procure their testimony.

On our part, besides the case of Lord Anglesea from the State Trials, we have also upon this subject produced to the court the cases from M'Nally, to show, that where the punishment is discretionary, evidence of character may be produced upon the trial, to inform the mind of the court as to the fine to be imposed. One of the counsel associated with me appears to have been concerned in one of those cases, and has stated the circumstances of it to the court. The counsel for the prosecution contend, that these cases only show that character may be given in evidence upon a criminal prosecution; and they contend that the only reason why such evidence is ever admitted, is because it demonstrates

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the improbability that a man of such a character would be guilty of such a crime. We admit that this kind of proof may, in some cases, be properly given for the purpose stated by our opponents; for the evidence may be so equally poised that even the circumstance of character may turn the balance. But the cases in M'Nally do not go upon this principle. They admit the offences to have been fully proved, and state the evidence of character to have been received merely to guide the discretion of the court as to the extent of the punishment. Either, therefore, these cases must not be law, or they show that evidence in mitigation, where the punishment is discretionary, is proper upon the trial.

I have now gone through the argument which I proposed to lay before the court. If we are right, then the beauty and harmony of our criminal system is preserved throughout all its parts; the right of the accused to have compulsory process for his witnesses, is maintained; and he is enabled, not only to manifest his innocence, if the evidence will support it, but, if he is not perfectly innocent, to show the shade and colour of his offence, that the punishment may, by the court, be proportioned to it.

I conclude with observing, that the interest which the public has taken in this cause has perhaps been sufficiently accounted for. It is a state prosecution, instituted by the president's orders, for acts done with the president's knowledge and approbation. It is, therefore, highly important; and the sense of its importance may perhaps have been heightened in the public mind, by seeing the learned judge of another district called upon to assist the public prosecution, and to lend his exertions and talents in support of the prosecution.

Thursday, July 17th, 1806.

PATERSON, J. It appears to the court, that James Madison, secretary of state, Robert Smith, secretary of the navy, and Jacob Wagner and William Thornton, who are officers under the department of the secretary of state, have been duly served with subpœnas to attend as witnesses on the part of the defendant, and that they do not attend pursuant to the process of the court. As the facts charged in this indictment, if committed at all, were committed at the city of New-York, the court could not perceive how the above-named persons, who reside at the city of Washington, and were there during the transaction, could be material witnesses on the trial of the indictment; and were of opinion that, under such circumstances, an affidavit in common form was not sufficient to put off the trial. The consequence is, that the court would inquire into the grounds of the general allegation set forth in the common affidavit, and insist upon the defendant's stating the point of materiality, which he expected to prove by these witnesses. Perhaps the defendant, by stating particulars in his affi-

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davit, and the material facts, which he intended to prove by their testimony, might remove this doubt, and induce the court to grant his application. This was the substance of the opinion delivered by the court on Monday, and which, on a review, are considered to be correct, and perfectly consistent with the principles and usages of law. The result of this opinion has been, that the defendant has come forward with an affidavit stating the material facts, which he conceives he will be able to prove by the evidence of Mr. Madison, Mr. Smith, Mr. Wagner and Mr. Thornton. This part of the affidavit runs in the following words: "And this "deponent further saith, that he hopes and expects to be able to "prove, by the testimony of the said witnesses, that the expedi- "tion and enterprise, to which the said indictment relates, was "begun, prepared and set on foot with the knowledge and appro- "bation of the president of the United States, and with the know- "ledge and approbation of the secretary of state of the United "States. And the deponent further saith, that he hopes and ex- "pects to be able to prove, by the testimony of the said witnesses, "that if he had any concern in the said expedition and enterprise, "it was with the approbation of the president of the United States "and the said secretary of state. And the deponent further saith, "that he is informed, and doth verily believe, and hopes and ex- "pects to be able to prove, by the testimony of the said wit- "nesses, that the prosecution against him for the said offence "charged in the said indictment, is commenced and prosecuted "by order of the president of the United States. And the de- "ponent further saith, that he has been informed, and doth verily "believe, that the said James Madison and Robert Smith are "prevented from attending by order, or interposition of the presi- "dent of the United States."

In consequence of the foregoing statement, the defendant has moved the court, 1. To postpone the trial. 2. For an attachment against those absent witnesses. These questions have been ably and elaborately argued by the counsel on both sides. They are important both as to their general nature and as to their immediate pressure and bearing on the cause now at issue; and I have given them all the consideration that my feeble habit of body would permit.

The first question is, whether the facts stated in the defendant's affidavit be material, or ought to be given in evidence, if the witnesses were now in court, and ready to testify to their truth? Does the affidavit disclose sufficient matter to induce the court to put off the trial? As judges, it is our duty to administer justice according to law. We ought to have no will, no mind, but a legal will and mind. The law, like the beneficent author of our existence, is no respecter of persons; it is inflexible and even-handed, and should not be subservient to any improper considerations or views. This ought to be the case par-

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ticularly in the United States, which we have been always led to consider as a government not of men, but of laws, of which the constitution is the basis.

The evidence which is offered to a court must be pertinent to the issue, or in some proper manner connected with it. It must relate and be applied to the particular fact or charge in controversy, so as to constitute a legal ground to support, or a legal ground to resist the prosecution. For it would be an endless task, and create inextricable confusion, if parties were suffered to give in evidence to the jury whatever self-love, or prejudice, or whim, or a wild imagination might suggest. This is an idea too extravagant to be entertained by reflecting and candid men; as it would, if carried into practice, quickly prostrate property, civil liberty, and good government. Law would become a labyrinth — a bottomless pit; and courts would be perverted from their original design, and turned into instruments of injustice and oppression. A line must be drawn—a line has been drawn on such occasions, which it becomes the duty of judges to pursue. If there be no line, any thing and every thing may be given in evidence. Where shall we stop? What is the rule which we find to be laid down for our guidance? The evidence must be pertinent to the issue. The witnesses must be material. If the evidence be not pertinent, nor the witnesses material, the court ought not to receive either. Let us test the affidavit of the defendant by this principle or rule. The defendant is indicted for providing the means, to wit, men and money, for a military enterprise against the dominions of the king of Spain, with whom the United States are at peace, against the form of a statute in such case made and provided. He has pleaded not guilty; and to evince his innocence, to justify his infraction of the act of congress, or to purge his guilt, he offers evidence to prove, that this military enterprise was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government. Sitting here in our judicial capacities, we should listen with caution to a suggestion of this kind, because the president of the United States is bound by the constitution to "take "care, that the laws be faithfully executed." These are the words of the instrument; and, therefore, it is to be presumed, that he would not countenance the violation of any statute; and, particularly, if such violation consisted in expeditions of a warlike nature against friendly powers. The law, indeed, presumes that every officer faithfully executes his duties, until the contrary be proved. And besides the constitutional provision just mentioned, the 7th section of the act under consideration expressly declares, that it shall be lawful for the president of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be judged ne-

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cessary for the purpose of preventing the carrying on of any such expedition or enterprise from the territories of the United States against the territories or dominions of a foreign prince or state, with whom the United States are at peace. 3 Swift's Ed. 91, 92. The facts, however, which are disclosed in the defendant's affidavit, we must, in the discussion of the present question, take to be true in the manner therein set forth; and the objection goes to the invalidity, the inoperative virtue, and the unavailing nature of the facts themselves. Are the contents of the affidavit pertinent, are they material, are they relevant? The 5th section of the statute, on which the indictment is founded, is expressed in general, unqualified terms; it contains no condition, no exception; it vests no dispensing power in any officer or person whatever. Thus it reads: "And be it further enacted and "declared, that if any person shall, within the territory or juris- "diction of the United States, begin or set on foot, or pro- "vide or prepare the means for any military expedition or en- "terprise to be carried on from thence against the territory or "dominion of any foreign prince or state, with whom the Unit- "ed States are at peace, every such person, so offending, shall, "upon conviction, be adjudged guilty of a high misdemeanor, "and shall suffer fine and imprisonment at the discretion of the "court, in which the conviction shall be had, so as that such fine "shall not exceed three thousand dollars, nor the term of im- "prisonment be more than three years."

The section which I have read is declaratory of the law of nations; and besides, every species of private and unauthorised hostilities is inconsistent with the principles of the social compact, and the very nature, scope, and end of civil government. The statute, which is the basis of the present indictment, was passed the 5th June, 1794, and was temporary; but congress found it expedient, and perhaps, necessary, to continue it in force, without limitation of time, which was done on the 24th April, 1800. This 5th section, which prohibits military enterprises against nations with which the United States are at peace, imparts no dispensing power to the president. Does the constitution give it? Far from it; for it explicitly directs, that he shall "take care, that the laws be faithfully executed." This instrument, which measures out the powers, and defines the duties of the president, does not vest in him any authority to set on foot a military expedition against a nation, with which the United States are at peace. And if a private individual, even with the knowledge and approbation of this high and pre-eminent officer of our government, should set on foot such a military expedition, how can he expect to be exonerated from the obligation of the law? Who holds the power of dispensation?—True, a *nolle prosequi* may be entered, a pardon may be granted; but these presume criminality, presume guilt, presume amenability to ju-

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dicial investigation and punishment; which are very different from a power to dispense with the law. Supposing then, that every syllable of the affidavit is true, of what avail can it be on the present occasion? Of what use or benefit can it be to the defendant in a court of law? Does it speak by way of justification? The president of the United States cannot controul the statute, nor dispense with its execution, and still less can he authorise a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government. In this particular, the law is paramount. Who has dominion over it? None, but the legislature; and even they are not without their limitation in our republic. Will it be pretended, that the president could rightfully grant a dispensation and licence to any of our citizens to carry on a war against a nation, with whom the United States are at peace? Ingenious and learned counsel may imagine and put a number of cases in the wide field of conjecture; but we are to take facts as we find them, and to argue from the existing state of things at the time. If we were at war with Spain, there is an end to the indictment; but, if at peace, what individual could lawfully make war, or carry on a military expedition against the dominions of his Catholic majesty? The indictment is founded on a state of peace, and such state is presumed to continue, until the contrary appears. A state of war is not set up in the affidavit. If then, the president knew and approved of the military expedition set forth in the indictment against a prince, with whom we are at peace, it would not justify the defendant in a court of law, nor discharge him from the binding force of the act of congress; because the president does not possess a dispensing power. Does he possess the power of making war? That power is exclusively vested in congress. For by the 8th section of the 1st article of the constitution it is ordained, that congress shall have power to declare war, grant letters of marque and reprisal, raise and support armies, provide and maintain a navy, and to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions. And we accordingly find, that congress have been so circumspect and provident in regard to the last three particulars, that they have from time to time vested the president of the United States with ample powers. Thus by the act of the 28th February, 1795, 3 Swift's Edition, 188. it is made lawful for the president to call forth the militia to repel invasions, suppress insurrections, and execute the laws of the union. Abstractedly from this constitutional and legal provision, the right to repel invasions arises from self-preservation and defence, which is a primary law of nature, and constitutes part of the law of nations. It therefore becomes the duty of

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a people, and particularly of the executive magistrate, who is at their head, and commander in chief of the forces by sea and land, to repel an invading foe. But to repel aggressions and invasions is one thing, and to commit them against a friendly power is another. It is obvious, that if the United States were at war with Spain at the time that the defendant is charged with the offence in the indictment, then he does not come within the purview of the statute, which makes the basis of the offence to consist in beginning or preparing the means to carry on a military expedition or enterprise against a nation, with which the United States are at peace. If, indeed, a foreign nation should invade the territories of the United States, it would, I apprehend, be not only lawful for the president to resist such invasion, but also to carry hostilities into the enemy's own country; and for this plain reason, that a state of complete and absolute war actually exists between the two nations. In the case of invasive hostilities, there cannot be war on the one side and peace on the other. What! in the storm of battle, and, perhaps, in the full tide of victory, must we stop short at the boundary between the two nations, and give over the conflict and pursuit? Will it be an offence to pass the line of partition, and smite the invading foe on his own ground? No; surely no. To do so would be a duty, and cannot be perverted into a crime. There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war. A nation, however, may be in such a situation as to render it more prudent to submit to certain acts of a hostile nature, and to trust to negociation for redress, than to make an immediate appeal to arms. Various considerations may induce to a measure of this kind; such as motives of policy, calculations of interest, the nature of the injury and provocation, the relative resources, means and strength of the two nations, &c. and therefore, the organ entrusted with the power to declare war, should first decide, whether it is expedient to go to war, or to continue in peace; and until such decision be made, no individual ought to assume an hostile attitude; and to pronounce, contrary to the constitutional will, that the nation is at war, and that he will shape his conduct, and act according to such a state of things. This conduct is clearly indefensible, and may involve the nation, of which he is a member, in all the calamities of a long and expensive war. It is a matter worthy of notice on the present occasion, that when the offence laid in the indictment is stated to have been committed, congress were in session; and if, in their estimation, war measures were prudent or necessary to be adopted, they would no doubt have expressed their sentiments on the subject, either by a public declaration of their will, or by authorising

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the executive authority to proceed hostilely against the king of Spain. But nothing of this kind has been done, or at least appears to have been done. Congress did not choose to go to war; and where is the individual among us, who could legally do so without their permission. Whoever violates the law becomes liable to its penalties; nor can the observance of the law be dispensed with, unless it contains a clause authorising certain persons to dispense with it, under specified circumstances, or whenever they may think it expedient. In the present case, if war had occurred between the United States and Spain, at the time the facts stated in the indictment were committed, they would not amount to an offence within the statute, which relates to a time of tranquillity and peace. The defendant and his case would have been out of the statute. War is not pretended; and the law under consideration is absolute, requires universal obedience, and does not vest any officer with a dispensing power, or the extraordinary privilege of authorising a person to do what it expressly prohibits. It appearing then, that the testimony of Mr. Madison, Mr. Smith, Mr. Wagner and Mr. Thornton, as stated in the defendant's affidavit, is not pertinent to the issue, nor material by way of justification for defence against the facts charged in the indictment, their absence cannot operate as a legal excuse to put off the trial.

But it has been contended, that if the testimony offered should not amount to a justification, it will to a mitigation of the punishment, and ought to pass to the jury for the sake of reaching the ears of the judges. I take this to be incorrect in principle so far as it regards criminal prosecutions. Why suffer evidence to go to the jury, that is not pertinent to the issue, that will not justify the defendant, nor prove his innocence, nor purge his guilt? Is it that the court may instruct the jury that they must not regard such evidence, because it is irrelevant? This would be a work of supererogation and inutility. Nor is this all; the evidence may warp their opinion, may mislead their judgment, and induce them to find an erroneous verdict. If they acquit in consequence of this improper testimony, would a new trial be granted? Evidence, which operates merely in mitigation of the punishment, is fit for the court only. If the defendant be convicted, then the question of mitigation arises, and will come properly before the judges. I have always taken the distinction to be between criminal and civil cases. On an indictment for a misdemeanor, where the punishment is discretionary, the jury are to determine whether the defendant be guilty or not of the charge exhibited against him; and it is the peculiar and exclusive province of the court to ascertain the punishment. The jury have no voice in fixing the punishment; and why should they hear evidence respecting it? In civil prosecutions, instituted to recover damages, as in an action for assault and battery, false imprisonment, evidence in

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mitigation should be addressed to the jury, because they are the legal constituted assessors of the quantum of damages. It is of the utmost importance to the due administration of justice, that the boundary between the province of the judges and the province of the jury, which is accurately marked by the law, should be inviolably preserved; it ought not to be broken in upon, as it would lead to confusion, and render our civil rights precarious.

The case of Anglesea, 9 State Trials, 335. has been cited to prove, that the vindictive temper and conduct of Anglesea, a day or two preceding the assault, were given in evidence, though strongly resisted by his counsel. This may have been proper in two points of view. 1. Because, according to the practice of Westminster-Hall, matter in aggravation, previously to the commission of the offence and conviction of the offender, are not usually laid before the court after conviction, in order to increase the punishment. This is a humane practice, and in favour of the offender. I say usually, because there may be some exceptions, or some anomalous cases to the contrary. 2. Because the previous conduct, and malicious spirit of Anglesea naturally led to the assault, were connected with it, and constituted one offence. It is usual to relate the circumstances attending the fact, which form no inconsiderable ingredient in the transaction, and are perfectly consistent with the nature of the case, and the issue.—What is it, but to set forth the special manner of the fact or offence. In the case cited, it was the same person, it was the same offence. This case, therefore, is not applicable to the present, and cannot be assimilated to it.

Several passages were read in M'Nally's evidence, which went to show in what cases the character of the prisoner may be given in evidence on his trial. Great relaxation of the old rule has of late years obtained, at least in the Irish courts of judicature; for in a certain class of cases, the character of the defendant, when it bears on the issue, and goes to show the improbability of his having committed the fact laid in the indictment, is permitted to be given in evidence; as on indictments for seditious libels, for riots and assaults, for forgeries, &c. Let us hear the opinions of Lord Carlton, Lord Kilwarden, Baron Smith, and Lord Kenyon, 1 M'Nally's evidence, 321, 322, 323.

In the King v. John Brown, commission of oyer and terminer, Dublin, December, 1798. Before Lords Kilwarden and Carlton, chief justices. The prisoner was indicted, at common law, for uttering a forged instrument, purporting to be a promissory note for money of Sir Thomas Lighton, and Co.—The prisoner offered evidence of character; which was objected to on the old rule, that evidence of character was only admissible *in favorem vitæ*, on capital charges, but the indictment here was not capital, but merely a misdemeanour. "Lord Carlton, C. J. of Com. P. said, he had conversed with many of the judges on

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" the subject now before the court, who thought, as he did, that
" in cases where character was put in issue, evidence of such a
" nature might be very material: for example, suppose a man
" of very great property was indicted for perjury, where the ob-
" ject to be obtained by the perjury was a mere trifle, for in-
" stance a shilling; or suppose a man to be charged with a riot
" or assault, who was known to be of a peaceable and quiet dis-
" position; evidence of character in such cases, directly encoun-
" tering the nature of the charge in the indictment, must be of
" the last importance. His Lordship then cited the King v.
" Robert Carr, Guildhall, London, 32 Car. 2. on an information
" for a libel against the government. Sir William Scroggs, who
" was the judge, and who was not likely to grant a prisoner, in
" such a case, any privilege that he was not entitled to, admit-
" ted the defendant to give evidence of his character and deport-
" ment. Lord Chief Justice Holt, his Lordship observed, also
" admitted this species of evidence; and all the judges in Ire-
" land, upon the late circuits, uniformly received evidence of
" loyalty, in cases where the charge was of a seditious nature,
" though amounting only in point of law to a misdemeanour.

" Lord Kilwarden, C. J. Ban. Reg. agreed with Lord Carlton,
" and observed, that the reason generally assigned for the ad-
" mission of such evidence in capital cases, and in capital cases
" only, was altogether unsatisfactory to his mind. It was said to
" be in *favorem vitæ*; but he had no conception, according to the
" principle of sound sense and right reason, that character could
" be evidence in a case affecting the life of a man, and yet not
" evidence in a case affecting his freedom, his property, and his
" reputation.

" In the King v. Crawley, commission of oyer and terminer,
" Dublin, February, 1802. W. Smith, B. in his charge to the
" jury, adverted to the evidence of good character, which had
" been given for the prisoner. Character, he said, is of great
" weight in every case, and requires particular attention, when
" the charge is grounded on circumstantial evidence; for it then
" creates a greater degree of doubt than where the prosecution is
" supported by direct evidence. In the former case, evidence of
" character ought to be particularly attended to, because the jury
" is more or less embarrassed, and called upon to weigh the case
" with more scruple and doubt, from the very nature of the tes-
" timony.

" Lord Kenyon's sentiment, though promulged in a capital
" charge of the first magnitude, may be well applied to all cases,
" where the character of the defendant comes in issue. An af-
" fectionate and warm evidence of character, when collected to-
" gether, should make a strong impression in favour of a prison-
" er, and when those, who give such character in evidence, are

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" entitled to credit, their testimony should have great weight with " the jury."

The reasons assigned by the Irish judges, in favour of giving character in evidence on indictments for misdemeanours, when it bears on the issue, possess great weight, and, perhaps, are irrefragable. I feel no disposition to controvert them, nor is it necessary to do so on the present occasion. Character had, in the cases cited, an immediate and powerful bearing on the facts in issue, and did not go merely in mitigation of the punishment.

" Downe, J. (1 M'Nally, 320.) admitted the prisoner to give " evidence of character, as a fraud was charged, and the punish- " ment was not certain, but discretionary." The first reason given by Judge Downe is solid, because character bears on the point of fraud; but the second reason I do not consider in the same light, for it appears to me to be unsound, and incompatible with legal principles.

The suggestion, that the evidence should be permitted to pass to the jury, that they may determine whether the offender ought to be recommended for mercy, is utterly destitute of foundation. It does not merit a serious thought. The jurors are to hear such evidence, as the court think pertinent and material, and nothing more. But if matters, which may induce the jury to recommend the offender to the pardoning power, should be received in evidence, I do not know where we are to stop, or how to draw a line between the admission and non-admission of testimony. We should be without land marks; and afloat on the ocean without any compass to direct our course.

2. The attachment. On this subject the judges disagree, or, as the statute expresses it, their opinions are opposed. When this happens, the judges do not assign any reasons in favour of their respective opinions, but merely state the point of disagreement, that either party may carry it to the supreme court for ultimate decision, according to the 6th section of the act to amend the judicial system of the United States, passed the 29th of April, 1802.

One of the judges is of opinion, that the absent witnesses should be laid under a rule to show cause, why an attachment should not be issued against them. The other judge is of opinion, that neither an attachment in the first instance, nor a rule to show cause ought to be granted.

Immediately after the opinion of the court had been given *Sanford* moved to bring on the trial.

Hoffman requested permission for the counsel of the defendant to confer a few minutes together.

Morton requested a few days delay, or to the next term; he did it with great deference to the court, and should submit with silent respect to their decision. The ground on which this question had been argued by the gentlemen with whom he was joined,

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great force on his mind, and he hoped the court would admit of a short delay. He further requested that Mr. Smith's affidavit might be filed.

Paterson, J. The court have considered this point also, and determined that the trial should proceed. His own infirm state of health had for a moment inclined him to agree to a few days delay, with the hope that he might then be able to sit on the trial; but he was convinced that he should not in that time be sufficiently recovered. He therefore relinquished the idea of delay on his own account; and he did not perceive any benefit which could result to the defendant by granting the application.*

Judge *Paterson* then left the bench.

The district attorney renewed his motion to bring on the trial. But the counsel for the defendant expressing a wish that it might be postponed till to-morrow morning, the court, with the assent of the counsel for the prosecution, granted the postponement, on condition that the defendant's counsel would make no other attempt to create delay. And the defendant's counsel having assented to this, the court adjourned till to-morrow morning.

Friday, July 18th, 1806.

Present, Judge TALMADGE.

The court being opened, the district attorney moved to bring on the trial of

THE UNITED STATES *against* WILLIAM S. SMITH,

Which being ordered accordingly, the following jurors were balloted for, called, and sworn, viz.

John Sullivan,	John A. Fort,
John Rathbone, Jun.	James Masterton,
Lewis C. Hammersley,	Schuyler Livingston,
Coutland Babcock,	Henry Panton,
John P. Haff,	George Forman,
Goold Hoyt,	Augustus Wynkoop.

The district attorney then addressed the court and jury as follows:

May it please the court. Gentlemen of the jury,

The defendant, William S. Smith, is indicted for certain misdemeanours against the United States. It is alleged in the indictment presented by the grand jury, that he began, set on foot, and provided the means for a military expedition, to be carried on from the city of New-York, against the dominions of Spain in South America, the United States and Spain being at peace. This is a summary statement of the charge presented against

* Judge Paterson was extremely indisposed all the time he attended this court, and what the Reporter imagined, has since been realized; the good the great and the learned judge has since that day been translated to another and a better world. October 1, 1806.

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Col. Smith, to which he has pleaded that he is not guilty, and upon which he is now to be tried by you, and to receive conviction or acquittal from your verdict. It will immediately strike you, that every prosecution for an offence of this nature, must necessarily be of considerable importance, not only as it may affect the individual accused, but still more as it concerns our country, whose laws have been violated, and the foreign nation whose rights have been invaded by the offence. Interesting as every such prosecution must always be, it will be seen in the sequel, that the offence for which Col. Smith is now indicted, is peculiarly aggravated by the nature and object of this expedition, and the extent of the means prepared to carry it into effect.

The indictment against Colonel Smith, is founded upon the 5th section of the law of the United States, entitled "An act "in addition to the act, for the punishment of certain crimes "against the United States," passed the 5th June, 1794. This act was originally limited in its duration, but has since been rendered perpetual. It was first passed at a time when some of the principal powers of Europe were at war, and our own government had wisely determined to remain neutral and at peace. Notwithstanding this determination of our government, individuals embarked in hostile enterprises, and in our own country prepared the means of war against the belligerent powers. Attempts of this kind made by unauthorised individuals, and tending directly to violate the declared neutrality of the country, and endanger its peace, were the immediate occasion of enacting this statute.

This act, gentlemen, is declaratory of the law of nations. It defines several offences against that law, and provides for their punishment. The indictment in this case, is founded on the 5th section of the act, but in order that you may distinctly understand the nature of the offence, and the provisions of the law, it is proper that you should take a view of the whole act.

Sanford here read the whole act, and commented upon the several sections.

Some of the offences specified in this act, can only take place when foreign nations are at war, and the United States are at peace. Those enumerated in the 5th section, may take place when all the world is at peace.

I have said, that this act is declaratory of the law of nations. This appears from the phraseology of the law, by which it is enacted and *declared*, that if any person shall violate its provisions he shall be punished; a form of expression which is only used when the legislature mean to establish the law as they understood it to be before. But this appears still more conclusively from the principles established by the act, all of which were before recognised as principles of the public law, prevailing among all civilized nations. The first object of civil society

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is, to preserve the peace of the community, both against internal violence and external force. The right of making war, is, therefore, in every community, whatever may be the form of its government, vested in the supreme power of the state. It would be in vain that government should exist, or the restraints of society be imposed, if the individuals of one community were at liberty, without the authority of the supreme power, to make war upon those of another at pleasure. Such a state of things would be an extreme of barbarism, unknown even to the savage state. All civilized nations have therefore concurred in adopting these principles, that the right of making war, belongs exclusively to the sovereign power of the community; that it is not enjoyed by individuals, unless authorised by the sovereign power; and that it is the right and duty of every community, to restrain and punish its citizens or subjects, if they shall make unauthorised war against another community. These principles are the elements of the law of nations. They are found in every treatise on that subject. They are adopted, and defined, and inforced, in this law of the United States.

It is not unimportant in this view, to add, that the principles established by this act, had been adopted and applied to our situation as a neutral power, by the first president of the United States, before this law passed. The object of this act was to inforce these principles more effectually, to adopt them as a part of our own municipal code, and to provide adequate punishment for those who might offend against them.

By our constitution, the right of making war is vested in congress. It is not entrusted to the president alone, or to the president and senate, who by a treaty may terminate the state of war and restore peace. It is a power which no individual state can exercise, though for many important purposes, the several states are absolute sovereignties. It belongs then exclusively to the whole legislature, to declare that the United States are at war. Until such a declaration is made, the nation is at peace; it is the duty of every citizen, to conform to the will of the nation, and to abstain from all acts of violence or warfare, against the dominions and people of foreign states. I speak not here of that warfare which may take place in our own country, in suppressing insurrections or repelling invasions. Those cases stand on different ground, and do not in the least interfere with the principles which I now lay down.

If then, it be the duty of our citizens to abstain from acts of violence and war against other nations with whom we are at peace, how is that duty to be inforced? I answer, by this law which is now before you. Its provisions are adapted expressly to such cases. The words of the fifth section, are sufficiently comprehensive to embrace every case. "If any person shall "begin, or set on foot, or provide, or prepare, the means for any

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"military expedition or enterprise, he shall be punished." These words are not terms of art; they are to be understood in their ordinary sense and acceptation, and, so understood, they unquestionably embrace every case in which any person may attempt to violate the duties of neutrality and peace.

I come now to speak more particularly of the charges contained in the indictment. This indictment contains seven counts, or distinct charges against the defendant. For all the purposes of the present trial, it will be sufficient, I conceive, to state to you the substance of three of them. It is first alleged that the defendant began a military expedition in this city, to be carried on against the dominions of Spain, in South America. It is also alleged, that the defendant set on foot a military enterprise, in this city, to be carried on against the dominions of Spain, in South America. Another charge is, that the defendant provided thirty men, and three hundred dollars in money, as the means for such enterprise. If any one of these charges shall be established by evidence, the prosecution will be maintained, and it will be your duty to convict the defendant, unless he shall on his part establish some sufficient defence.

The general charge against the defendant, seems to resolve itself into four principal points, to be established before the court and jury. 1st. That a military expedition was set on foot in this city. 2d. That this military expedition, was destined to be carried on against the dominions of Spain, in South America. 3d. That the defendant was concerned in preparing the expedition, in some of the modes charged in the indictment; that is to say, either by beginning it, or by setting it on foot, or by providing men and money, as means for the expedition.—And, 4th. That at the time when this shall appear to have been done, the United States and the King of Spain were at peace. These are the constituent parts of the offence, and they must be established affirmatively on the part of the prosecution. I trust that we are able to establish them to your entire satisfaction.

I will now briefly state to you the substance of the testimony which we shall offer for that purpose.

It will appear that Miranda, a native of Caraccas, in South America, and formerly an officer in the Spanish service, left that service in disgust, or disgrace, more than twenty years ago. From that time he conceived a project of effecting a revolution in his native country, and dismembering it from the crown of Spain. He was soon afterwards in the United States, and then disclosed his project to many individuals here. He proceeded to Europe, and through a variety of fortune there, constantly pursued his long meditated project, and at different times laid it before the governments of Great-Britain and France, soliciting their assistance.—Not having succeeded in Europe, he again came to the United States, in November last. Here he employed himself, in pre-

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paring the means for a military expedition against the province of Caraccas. His project and views, were fully made known to Col. Smith, who embarked in them, and undertook to provide some of the essential means for the enterprise. The ship Leander, which was pointed out by Smith as proper for the expedition, was engaged for that purpose. A great quantity of arms, and military stores, and equipments of all kinds, was procured for the expedition, men were enlisted by Smith himself, and by his agents, and the wages advanced upon their enlistment were paid by Smith.—Some few of these men, who were destined to act as officers, were informed of the secret object of the expedition, but the greater number were told that they were enlisted for the service of the United States, and were not to go out of their territories. The latter representation was made by Smith and his agents.

The object of the expedition will be established by irrefragable testimony. That object was to invade the province of Caraccas, to make war against the existing authorities of the country, and to separate it by force from the dominion of Spain.

This, gentlemen, is a brief outline of the case which is now to be filled up by testimony. You already perceive that it exhibits no common spectacle. In a moment of profound peace with all nations, a considerable number of individuals in the bosom of our country, conspire to make war, organize themselves into a military association, and provide the means for extensive military operations; and all this not merely for the purpose of rapine at land, or plunder at sea, but for the more audacious and dangerous purpose of invading a peaceable and unoffending people, the colonies of a prince at peace and in amity with us, in order to subdue those colonies, and wrest them from their lawful sovereign, by the sword. Such an attempt is a flagrant and daring usurpation of the sovereign right of this community, to make war or remain at peace, as its government may think proper, and at the same time a violent outrage upon the rights of Spain. The direct tendency, perhaps I might say, the inevitable consequence, of such an attempt, must be to involve the nation in war. Reflect for a moment upon the state of things which would exist if this expedition should succeed. The United States and Spain nominally at peace, but an important part of the territories of Spain wrested from her dominion, by hostile force prepared in the territories of the United States. Or, if you please, reverse the picture, and suppose our own shores should be invaded by a banditti who had prepared a military expedition in Spain, and had come hither to separate us from our own government by force. It is not necessary for me to ask you how you would view such an attempt, or how it would be treated by the government and people of this country.

I forbear to pursue these reflections farther. I have not suggested them to enlist your passions or to excite your prejudices upon this occasion. Such an attempt I equally disdain and

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disclaim. If I supposed it possible that you had come to this seat of justice with any partialities whatever, I would entreat you to lay aside every partial feeling, to dismiss every prejudice, and discard every passion. But as I know not why you should entertain any other wish upon this occasion than that justice may prevail, I should insult you by making such a request.

The duty which is now assigned to you may be disagreeable, but I think I can assure you that it will not be difficult. The testimony which will be laid before you will undoubtedly maintain the indictment and establish the offence.

If this shall be done, the defendant must consequently be convicted, unless he has some legal defence. On that point I can only say that I know of no defence which can be made, and I will not attempt to conjecture what his counsel may offer.

In a cause of such magnitude, involving not only the execution of our own laws, but also the reparation due to a foreign state, whose rights have been invaded, I trust that you will hear with patience, decide with deliberation, and in the simple and expressive language of your oath, give a true verdict according to evidence.

Samuel G. Ogden sworn.

Sanford. Do you know Colonel William S. Smith? *A.* Yes.

Q. How long have you known him? *A.* A great many years.

Q. How many years? *A.* Three or four years. I have known him as a gentleman.

Q. Have you ever seen Col. Smith and Gen. Miranda in company together? *A.* I have seen them together, but I do not recollect the precise day when. I think it was about the beginning of January; but perhaps it might be the latter end of December.

Q. Did Col. Smith introduce Miranda to you? *A.* He did.

Q. Was it in this city? *A.* Yes.

Q. Are you sure whether it was in January or December that you saw them together? *A.* It might be December, but I cannot recollect.

Q. When they were together with you, was there any particular conversation? *A.* There might be a great deal, but I cannot say what it was.

Q. Do you know what was the object of the first meeting between you, Col. Smith and Miranda—did you hear? *A.* The object of the first meeting was to make me acquainted with Gen. Miranda as a man of science and a great traveller.

Q. What was the object of the expedition that was fitting out at that time? Was it against the Spanish dominions in South America? *A.* I decline answering that question.

Q. Did you ever hear Col. Smith speak of an expedition to the West-Indies?

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Hoffman. To answer such questions as would tend to criminate himself will not be required by the court. By this mode they cannot expect to criminate Col. Smith. Mr. Ogden is now required to show the destination of the Leander, without which they will be defeated in establishing the counts in the indictment; with it, they may, perhaps, be enabled to bring sufficient testimony to establish their charge.

Ogden. If you ask this as a particular question, I decline to answer. If you put it as a general question, I answer, yes.

Court. It appears a proper question. You must say if you know any thing of a conversation or declaration of Mr. Smith, made relative to the matters charged in the indictment.

Colden hoped the court would hear him on this point; he expected to show that the witness is not obliged to answer questions like that now proposed; he cannot be compelled to give testimony as to confessions or conversations of the defendant, which may be made use of against the witness when it comes to his turn to be a defendant, and which will tend to criminate him.

Court. the question is, if the witness heard Col. Smith say any thing as to his agency or procuration of this expedition. It is proper he should give testimony on that point.

Colden. I hope this is not a positive decision of the court, but that they will hear us on so important a point. The court is now to make a decision of the utmost consequence, not only to this defendant and to the witness, but to every citizen, inasmuch as it involves a fundamental principle in the administration of justice. A witness is not bound to give testimony which may tend to criminate himself; the witness ought not to be called upon to give the testimony required of him, because it may tend to criminate himself. And that it may do so, will be obvious to the court when it turns to its records, and sees that there is an indictment on its files against the witness for the same offences with which the def endant is charged.

Edwards said, that the question might be well understood, he would put it in a new form: Did you ever hear Col. Smith speak of the expedition of the Leander to South America, and what did he say?

Colden. This mode of putting the question by no means removes our objections. We contend, not only that a witness shall not be compelled to answer a question, when the answer may criminate him immediately, but that he shall not be compelled to answer a question which may *tend* to criminate himself.

Court. You must show how this tends to criminate Mr. Ogden.

Colden. Nothing can be more obvious than that it may do so. If Mr. Ogden were not indicted for having participated in the offence, with which the defendant is charged, still, inasmuch as he would be liable to be indicted at any time hereafter, if it should appear that he was a *particeps criminis*, he might object

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to answer the question, on the ground that his answer would disclose his participation in the acts of which the defendant is accused. But when the court finds that the witness is indicted for the very same offence with which the defendant is charged, the force of our objection must be immediately felt. The defendant and the witness are indicted for fitting out in the Leander, a military expedition against the Spanish colonies. Now, in order to convict the witness on the indictment which is preferred against him, it will be incumbent on the prosecutor to prove, not only that the witness did provide and prepare means which might be applied to a military expedition; but he must show upon the trial of the witness, that the witness knew that the means he did provide were intended for a military expedition. For without such knowledge there can be no criminality. The witness would be no more criminal than any other person, who may have provided, or bought and sold articles of the same description. Now, if the witness in answer to the question put, should say, I had conversations with Colonel Smith, in which conversations we talked of the Leander; he told me that she was destined to carry on a military expedition against the Caraccas, and he engaged me to provide means for the expedition; would not this tend to criminate the witness? Would it not be conclusive against him to show that he had a knowledge of the expedition; and would the public prosecutor have any thing more to do, when he comes to put the witness on his trial, than to prove by the testimony of some by-stander, that the witness, in answer to the question then put, gave such testimony as I have supposed; and could not this *tend* to criminate him? Nay, it would directly criminate him, for it would be making him supply, by his own testimony, an essence of his crime. Let us suppose, that the witness really participated in the offence with which the defendant is charged; that he knew the destination of the Leander and the intent of the expedition connected with her; that there exists at present no evidence of the witness having such knowledge; and that the witness was now on his trial, is it not certain that he would be acquitted for the want of proof of what is so necessary to make his acts criminal? To supply this want of testimony by management, Colonel Smith is first put on his trial, and Mr. Ogden called on as a witness to furnish testimony against himself. It is not necessary for us to show, how the answer to the proposed question may criminate the witness. It is sufficient that the witness says it would furnish matter for his own accusation. You cannot call upon the witness to explain how he would be implicated by his answer, because if you did, you would contravene the reason of the rule, and draw him from that protection which he ought to find under the rule. For if the witness is to tell you how his answer would criminate himself, he must first tell you what his answer would be, and show its bear

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ing and connection with other circumstances, before you could judge whether it would criminate him or not. We contend, therefore, that it must rest on the witnesses own declaration. If he says the answer would criminate him, he will not be obliged to give the answer. If it should be objected that if this doctrine prevails that then a witness in every case would have it in his power to arrest his examination and to conceal the truth by saying that his answer would expose his own guilt; we shall not deny that this would in a great degree result from our construction of the rule of law. But all human institutions have, and must have their imperfections; and it is one in the administration of justice that it may happen that a witness may avail himself of this rule to suppress the truth. But then let it be remembered, that he must do so by committing a perjury; for he must say upon his oath that the answer required of him would criminate himself; and you have then the same assurance for the truth of this declaration that you have for any other fact that depends upon the oath of a witness. Mr. Ogden having declared on his oath, that he cannot answer the questions which have been proposed to him without criminating himself, we trust the court will say he cannot be compelled to give an answer.

Hoffman. One word. No accomplice can ever be forced to give testimony against himself. It is a general rule of law, and recognised by the practice of all our courts of justice. If the attorney-general wants to make use of the testimony of Mr. Ogden on this point, he must first enter a *nolle prosequi*, and discharge the witness from the prosecution.

Court. He is only to say whether he has heard any confessions or admissions on the part of the defendant; but he is not called on to say in what degree he may have been an accomplice.

Hoffman. What I stated is an universal principle, and the court must be sensible that if Mr. Ogden stood here in the character of an accomplice, he could not be called upon to give testimony at all. If he be a principal or co-principal in the offence, it cannot be inquired of. Nothing can entitle the prosecutor to his testimony but a *nolle prosequi*, according to all the rules of the English law.

Ogden. If I was to answer the question it may tend to criminate myself. I am indicted for the same offence, and a mutual communication on the subject would imply that each of us knew of the setting on foot and fitting out the expedition. I therefore decline the answer.

Sanford. Do you mean to submit, or do you refuse to answer? *A.* I have already refused, under the particular circumstances which I have stated.

Sanford. At present we do not call on the court to inforce its decision in respect to this answer; but we do not wave our right to call upon it for that purpose hereafter.

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Q. Did you see Smith and Miranda together more than once? *A.* I did, but I do not remember how often.

Q. Was it after Miranda's introduction to you? *A.* Yes. I have seen them walking on the battery together, that is in the month of January last.

Q. Did Miranda apply to you to charter a vessel? *A.* I do not think that question legal. If he had applied to me to charter, and I acknowledged it, it may be followed up to prove that I knew of the expedition that was set on foot.

Sanford. Did you charter a vessel to Miranda? Mr. Ogden was about to answer, when Emmet arose and said, he objects to that question. Ogden adds, I do.

Emmet. We not only object to this question as it forms a link in the chain of proof, which, if once obtained, fastens round the witness as well as the defendant. If Mr. Ogden says that he did charter a vessel to Gen. Miranda, then they might, by coupling other testimony, show that she was fitted out and laden with arms and ammunition; then show the particular object of her destination; and upon Mr. Ogden's trial it will be competent to give in evidence, by the testimony of a by-stander, that he had a knowledge or concern in the undertaking; he therefore cannot be called upon to answer whilst he is under prosecution. I will state a decision which has taken place on this head, which goes farther than we contend for. It is the case of Dr. Deman. The attorney-general filed an information, *ex officio*, for a libel. It was competent to be proved by the printer. In his defence, he stated that the printer was indicted also. The court immediately declared that the printer should not be asked a single question whilst he remained under indictment, or until a *nolle prosequi* was entered. But our objections go farther; we stand on the grounds of the constitution, and not the common law; and we must say that our lips are hermetically sealed, as to answering any qustions which may tend to criminate ourselves. We say that no questions can be asked of the witness in relation to any acts done by himself which by some subsequent testimony may be so connected as to tend to his own crimination.

Edwards wished the gentlemen had been prepared with more authorities to support the point they have taken up. The one that had been referred to, was a case not in England, but in Ireland. The books which generally serve as precedents in the United States, are precedents from the courts of England. We know not what modifications there are of English law in Ireland; therefore we do not rely more on the cases in that country, than in France; we are prepared to discuss this question of the *nolle prosequi*, and wish it to be decided on principle. I wish as much as any man to protect every person in the full enjoyment of his rights and privileges. I do not wish to go beyond the legal length in this examination.

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Court. Lest this point may be supposed to rest on a principle of law, I shall only say, that I cannot see how this question can tend to criminate himself. It could not be given in evidence on his indictment, as has been urged by the defendant's counsel, because it is not a voluntary confession on his part

Hoffman and *Emmet* both declared that it could be given in evidence by a third person.

Edwards asked again, how could it be given in evidence against himself? The chartering of a vessel is an innocent act, therefore, it does not criminate him. If I ask if he chartered his vessel to go to the Caraccas on a military expedition, that would criminate him; therefore he must not answer it. I admit to its fullest extent, that he must not answer a question, by which he may expose himself to be charged with a crime.

Ogden. My answer might lead to the fountain-head; they might supply by other witnesses what is wanting in mine, and thereby fill up the chasm. Yet my answer shall be determined by the opinion of my counsel.

Hoffman. The opinion of your counsel is, that you are not bound to answer the question; and we advise you not to answer it.

Sanford. We reserve our right to call on the court to inforce its decision, though we do not call upon it, at this time, for that purpose.

Hoffman. You have seen Gen. Miranda in company with Mr. Smith; have you not seen him in company with others? *A.* I have seen Gen Miranda frequently in company with the first characters in New-York.

Q. Did you ever hear from any of the officers of government, that he had dined with them and a number of other gentlemen in the city? That he is known also to Mr. Madison and to the president. I ask these questions with a view to remove any suspicions which may arise against Col. Smith, for being seen in company with Gen. Miranda.

Court. You may conceive that you may have a right to ask these questions, but I do not see to what purpose the answer would serve. It is nothing but hearsay, which is not evidence.

Nicholas Romaine sworn.

Q. Are you acquainted with Gen. Miranda? *A.* Yes. I know him pretty well.

Q. Have you known him many years? *A.* I have known him above twenty years.

Q. What country is he a native of? *A.* I have always understood him to have been a native of the Caraccas.

Colden. You will please to answer, sir, as to what you know of your own knowledge, not what you have understood.

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Edwards. If it was merely hearsay evidence, it would be improper; but it is certainly not an improper question to ask of one man, where another was born, with whom he had been acquainted twenty years.

Romaine. It was always reported, that Gen. Miranda was a native of the Spanish main, in the province of Caraccas.

Q. Was not Miranda some time in the Spanish service? *A.* I have understood so from books and authors which I have read. I do not know it from my own knowledge.

Q. When did he quit that service. *A.* I cannot tell. I think he held the rank of lieutenant-colonel or colonel; the circumstance being a novel one made an impression on my mind, as he was the first native American that ever arrived to that rank.

Q. How long is it since he left his native country? *A.* He came to America shortly after the revolutionary war. I think he left it in 1784; he went from here to England, as I am informed, and believe, as an officer, for I have seen him in regimentals myself.

David Gelston sworn.

Q. When the military expedition was fitted out in the Leander, had Mr. Ogden any other ships in port.

Emmet. This is not evidence pertinent to the issue.

Q. We will put the question in other words. Is not Mr. Ogden owner of several vessels? *A.* Yes.

Q. Does he own the Leander? *A.* Yes.

Q. When did the Leander sail on her last voyage? *A.* She cleared out the 23d of January and sailed the 3d of February last.

Q. Did she clear out for Jacquemel? *A.* Yes.

Q. What other vessels were in her company?

Emmet. Let the collector produce the custom-house books; the entries will be better testimony than his recollection.

Q. Have you the clearance with you? *A.* Yes. (The witness produces the clearance and the manifest of the cargo.)

Q. When did the Emperor sail? *A.* The Emperor, the Indostan, and the Diana all cleared out the 23d of December, and the Leander the 23d of January.

Q. Was T. Lewis captain of the Leander? *A.* Yes.

Cross examined.

Hoffman. Did the Emperor, Indostan and Diana clear out for Jacquemel? *A.* They cleared out for Port au Prince in St. Domingo.

John M'Lane sworn.

Q. Did you sell a quantity of arms and military stores which were put on board the Leander? *A.* Not in the last voyage, but in former ones I have. I have been in the habit of arming vessels for Mr. Ogden.

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Q. Did you not furnish some military equipments? A. Capt. Lewis applied to me for a number of things.

Q. Did he purchase of you any military articles?

M'Lane. Does this relate to the question about Col. Smith?

Hoffman. You must prove that Capt. Lewis was an agent of Col. Smith, before his actions can be brought against us.

Court. The object is to prove a military expedition, and then the part the defendant took in that expedition. This question goes to show, that a military expedition was set on foot; it is therefore a proper one.

District Att. We prove that a military expedition was set on foot, and that this witness was applied to for the purpose of carrying it into execution. We shall prove the agency of Capt. Lewis, and the jury will judge how far Col. Smith is implicated or connected with him.

Emmet. We contend that this kind of testimony is not fit to go to the jury; they are endeavouring to criminate the defendant by the acts of third persons. If they mean to charge us with the acts of Capt. Lewis, they ought to have laid the indictment for a conspiracy. We have heard much of the danger of improper evidence going to a jury which is not relevant to the issue; this appears to me to be wholly immaterial.

Court. The indictment charges the defendant with fitting out and preparing a military expedition; the preparation might have been done by himself, or by third persons. The public accuser will prove that an expedition was fitted out, and the manner in which it was conducted on the part of Col. Smith, or his agents.

Q. What articles did you sell Capt. Lewis? A. I sold him some slow-match linstocks, powder-horns, and some other small things, which I provided in January last, and put on board a pettiauger; they are articles which are used for the artillery on land. I saw them go on board.

Q. Who was to pay you for these articles? (A list of which, the district attorney held in his hand.) A. I hold Mr. Ogden's paper for them.

Q. Did you go any where with Capt. Lewis or Mr. Ogden, and see a number of muskets that were prepared for the Leander? A. After I returned from Washington, I saw several chests of arms at Price's, More's and Allen's. At Allen's I saw they were packed up in straw. I noticed it, because I considered it a bad mode of package; they should be put up in boxes.

Q. What did you see at Allen's? A. I saw several boxes there.

Q. You say, after you returned from Washington, you went to these places—what time did you go to Washington? A. I went in December and returned early in February.

Q. Did Capt. Lewis call upon you for any carriages for field-pieces? A. He did, and for carriages for garrison; but I could

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not spare him any. He went to some of the workmen; but they could not supply him, not having any sound materials.

Q. Did he ask you for muskets? *A.* He did; I had about three thousand of them, but I refused them, because I did not know but that the hostile movements on our frontiers might occasion an early demand for them on the part of government, and before they could be replaced.

Q. Was you ever on board the Leander? *A.* Yes; my errand there was this: Before I went to Washington, I was offered two brass field-pieces. I postponed the purchase of them until I returned, in expectation of getting them at a less price; and I found they had been disposed of in my absence. I found they were on board the Leander. I thought it somewhat strange, as I did not think any individual could afford to give the price I had been asked for them for ship's use. When I was on board, I saw those two pieces and other artillery between decks. I saw also a number of shot of different sizes.

Cross-examined.

Q. Are the articles enumerated in this list more than sufficient for an ordinary voyage of such a vessel? *A.* They were not.

Q. You have fitted out a great number of vessels before, have you not? *A.* I have been in the habit of fitting out ships twenty years, and except the slow-match, there was not military stores more than enough for a voyage to the Mediterranean or East-Indies.

Q. You say you shipped these articles in a pettiauger; did you do it openly and in the day time? *A.* I did.

District Attorney. Did you suppose that the guns and balls you saw on board, were more than enough for a vessel's use. *A.* Yes; enough for one or two vessels of her size.

Q. You are in the habit of furnishing military stores, ammunition, and arms; did you furnish the Leander with gun-powder. *A.* No, but I have furnished more of those articles for commercial purposes than was furnished for the Leander. I frequently furnish vessels with more than is enough for their equipment.

Court. What time was it when you used to furnish these extraordinary supplies. *A.* Two, three, four, and five years ago.

Ebenezer Stevens sworn.

Q. Did you vend some guns to Mr. Ogden? *A.* I sold him 6 iron 9 pounders. I saw him in the street, and informed him where they lay, and the price; they were taken away against my return home; this was the 5th January last. I do not know where they were taken to. I understood Mr. Ogden's cartmen took them away.

Cross-examined.

Q. Do you know whether the trade in arms, and ammunition, is not common from this port to St. Domingo, and other islands

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of the West-Indies, and those articles are considered as articles of merchandize? *A.* They are considered and traded in as articles of commerce.

Richard Belden sworn.

Q. Did you sell to Captain Lewis, or Mr. Ogden, any pistols, swords, or other instruments of war? *A.* Lewis and Ogden came to my house together, and I sold them 80 pair of pistols, 8 pair of a superior quality, and 130 swords; it was on the 20th January, 1806. I took Mr. Ogden's paper for payment. All those arms were for cavalry. I understood they were to go on board a ship, but the ship's name was not mentioned. By Mr. Ogden's order, they were packed up, and ordered on board; the price of the whole was 1700 dollars; 1600 was for the arms; the other was for some trifling things he had at the same time.

Jonathan Ogden sworn.

Q. Did you sell a quantity of gun-powder to Mr. Ogden? *A.* I sold him 50 quarter-casks, on the 25th of January last, I think it was from Martin Boerum's magazine, at Brooklyn; it was not stated to be for any expedition, but three-fourths of all the powder I sell is for exportation.

Cross-examined.

Q. This is an article of common merchandise; did you export it frequently? *A.* Yes, but much lately.

John Jacob Astor sworn.

Q. Did you sell any arms to Mr. Ogden or Mr. Lewis? *A.* No, I did not sell to either of them, but I sold to Belden, who sold to Mr. Ogden, about 60 or 70 swords.

Court. This testimony does not apply; you have Mr. Belden's testimony already.

Benjamin Haight sworn.

Q. Did you furnish Captain Armstrong with any military equipments.

Emmet. What bearing can this question have upon the issue; we have nothing to do with Mr. Armstrong or his purchases.

District Attorney. We shall show that Armstrong was the agent of the defendant.

B. Haight. About the 10th or 15th of January, Mr. Armstrong applied to me for accoutrements for riflemen, properly made for that purpose according to pattern; they were belts and pouches of a peculiar construction for that class of men; I made 250 sets, for 250 men, and delivered them to the order of Mr. Armstrong, and I was referred by Captain Lewis to Mr. Ogden for payment. There were saddles for gentlemen, I understood

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for their own use; they were not military saddles. All these articles were to be got ready by a certain time, I think five or six days after they were bespoke; they were delivered about the 18th or 20th of January.

Cross-examined.

Q. You say you were referred to Mr. Ogden for payment; did he order any of the articles? *A.* No, but he assumed the payment.

Q. Have not such articles been heretofore exported? *A.* Not that I know of.

Bernard Hart sworn.

Q. Did you sell any cannon to Captain Lewis or Mr. Ogden? *A.* I sold Captain Lewis 14 cannon in January last, I think the 8th; I presume he took them away, for I received Mr. Ogden's note for the payment.

Cross-examined.

Hoffman. What kind of cannon were they? *A.* I believe six of them were 9 pounders. I really do not know what the others were.

Abraham Vannest sworn.

I am a saddler. I made some cartridge boxes and belts, but no saddles, for the expedition. I made 250 sets, by the order of Mr. Armstrong, about the 12th or 20th, about the middle of January.

Hoffman. You can refer to your books for the time. *A.* He wished to have them made as soon as possible, and when I delivered them he gave me an order on Mr. Ogden for the amount of my bill.

Jonathan Fay sworn.

Q. Did Capt. Lewis apply to you for any arms? *A.* He called a number of times at my house, as I was informed by Mrs. Fay, and left word that he wanted me to procure some military equipments for him. I made out a list of all I had on hand. Sometime last January I met Capt. Lewis in Cherry-street, and I asked him if he had called upon me for equipments in my line. He said yes, I have called upon you several times, and if you will walk to the house I will tell you what articles I want. I went with him. He there gave me an order, which I executed about the 20th of January. The articles were 25 muskets, 18 pistols, 15 or 20 cutlasses. I had a number more, but I could not get them ready in time. I saw those I furnished safely delivered on board the Leander, between Courtland-street and Mr. Ogden's. I did not see them delivered in the hold, but on deck; it was a matter of notoriety that they were to go on board.

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Cross-examined.

Hoffman. Do I understand you to say that the whole of the expedition was a matter of public notoriety? *A.* Yes, it was public wherever I went; it was frequently a matter of conversation in the societies I visited.

Emmet. Did not the vessel lay at the back of the collector's house, and in a public and frequented part of the city? *A.* Yes.

Q. How many days was this shipment public in the city? *A.* I cannot tell, but it must have been at least 10 days.

Q. Do you mean 10 days prior to your shipment on the 20th of January? *A.* I think it was; every thing respecting it seemed to me to be well known.

District Attorney. What was a matter of general notoriety, and so well known as you describe it? *A.* That the Leander was fitting out for a secret expedition; but the place of her destination was not revealed.

P. Edwards. What was the matter of notoriety? *A.* It was the sailing of the vessel; that is what I meant to express; but I said that her destination was not publicly known, and that the goods I sold were intended to go on board of the Leander.

William Fosbrook sworn.

I am a surgeon's instrument maker, and frequently buy and sell swords. I did not sell any to Mr. Ogden, but to Capt. Lewis; and those I delivered on the 25th of January last; I have the bill here. (He read the bill; the amount was 704 dollars.) I was referred to Mr. Ogden for payment, and have his note for the same. I delivered the swords to the cartman They are charged at various prices, and were in the whole 129. I did not know the use they were intended for.

William Allen sworn.

I am a gunsmith, and sell those kind of arms frequently for exportation. I sold about 200 muskets to Mr. Ogden and Capt. Lewis. When they called the first time, they came together to purchase them. I sold them some 3 or 4 pounders cannon, but I do not know the day; I think it was some time in January. I delivered them to the cartman who came for them. The muskets were put in boxes. The boxes were sent to me without directions, but I do not know by whom. What pay I got for the articles, I got of Mr. Ogden, and the remainder I still look to him for. The application was made to me for the muskets within a week of the time in which they were supplied.

The court adjourned till to-morrow.

Saturday, July 19th.

The court, on account of the death of a child of Judge Talmadge, adjourned without proceeding on the trial.

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Monday, July 21st.

Present, TALMADGE, Judge.

Daniel Ludlow sworn.

Q. Did Gen. Miranda, when he last returned from England, bring a bill of exchange, or a letter of credit to you? *A.* Yes, he did; it was a letter of credit in favour of George Martin, from the house of Harman & Co. of London.

Q. Did you not understand the name to be a fictitious one, and that in fact it was Gen. Miranda? *A.* Yes.

Q. To whom did you pay the amount? *A.* A part I paid to Gen. Miranda himself, and gave him my note for the rest. When he was going to Washington I paid the balance due on that letter, or the amount of my note to Mr. Ogden. The letter of credit was for 800*l.* sterling. I paid the greater part to Mr. Ogden; but the exact sum I do not recollect.

Q. You considered the letter of credit as drawn in a fictitious name; how did you ascertain it to be the fact? *A.* I inquired of Mr. Rufus King, and he told me it was a counterfeit name, but the name by which he usually travelled.

Cross-examined.

Q. What was the date of that letter? *A.* It was dated in August.

Q. When did you receive it? *A.* It was shortly after the 23d of November, and before Miranda went to Washington.

William Wallace sworn.

Q. Did you sell Mr. Ogden any gunpowder last winter? *A.* I sold 100 quarter-casks which lay in Boerum's powder magazine on Long-Island. Mr. Ogden contracted with me for it.

Colden. When was this? *A.* About the middle of January.

Sanford. You gave Mr. Ogden an order for the delivery of it? *A.* Yes.

Hoffman. Is it not usual to export gunpowder from this city? *A.* Yes, it is frequently done.

Mr. *Gelston* now produced the custom-books to the time of clearance, &c. and the certificate of the Leander, she not being an American vessel.

Thomas Stevenson sworn.

Q. Are you a smith? *A.* Yes.

Q. Did you make any arms for Mr. Ogden? *A.* I repaired some muskets.

Q. Did you make a quantity of pikes for him? *A.* Captain Armstrong directed me to make some, but I do not know whether they were pikes or spears. I made 1200 myself, and got the rest made at other shops; there were between 4 and 5000 in all.

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They were packed up in casks, and delivered at a dock near which the Leander laid, and Mr. Ogden was paymaster for them.

Q. Was Capt. Armstrong the only person that gave orders on the occasion? *A.* He was the first, but toward the latter end Capt. Lewis also called, and required me to hurry on the work. They were delivered from the shop to the cartmen who were sent for them, about the 9th of January.

John Moore sworn.

Q. Did you sell arms to Mr. Ogden, Lewis or Armstrong? *A.* Mr. Price spoke to me first, and afterwards Capt. Lewis applied to me for both muskets and pistols; I can't say how many I sold him, but there was close by 100 muskets and 8 pair of pistols. Price told me I was to take Ogden's paper for money; this was some time last January or February.

Court. How many muskets did you say? *A.* Near 100, and 8 pair of pistols; they were put up in boxes, and delivered at different times; the last that was sent was carried to Mr. Ogden's house.

Juror. Where were the others delivered? *A.* They were delivered to the cartmen who were sent for them. I also furnished 3 drills and drill-bows.

Joseph Price sworn.

Q. Are you a gun-smith? *A.* Yes, and a cutler. Mr. Ogden and Capt. Lewis applied to me for muskets, swords and pistols. I sold him 180 odd mukets, (these are separate from what Mr. Moore sold him) 25 or 26 swords, and 29 pair of pistols, a few powder-horns and armourer's tools; it was about the 29th of January. I do not recollect the day they were put up in boxes, and delivered to the directions of Capt. Lewis. The cartmen had no orders, but they were Mr. Ogden's cartmen; one of them I see here in court, Mr. Shuld. The amount of my bill is about $1700, and Mr. Ogden is to pay me. They applied to me about three weeks before the articles were delivered.

Samuel Corp sworn.

Q. Did you sell some cannon to Mr. Ogden last winter? *A.* Yes, I sold him ten, I think they were iron, but I never saw them; they were sixes and nines; it was some time in January; they were laying at Waltham's wharf, and were delivered on my order to Mr. Ogden.

Colden. How long was this before the Leander sailed? *A.* I think it was about the middle of January they were taken away, and I was applied to three weeks before that; but I'll look at my books at home, and ascertain the time precisely.

[The reporter thinks Mr. Corp's clerk was in court, and furnished an extract from his books, for he came back and said

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that the contract took place on the 8th of January, and the application one week sooner.]

Cornelius Brinkerhoff sworn.

Q. Did you sell some pieces of cannon to Capt. Lewis last winter? *A.* Yes, 2 four-pounders. I sold them about the 12th of January, and he paid me for them; at least, I hold his paper for them.

Hoffman. At what time did this take place? *A.* I think it was in January, but I cannot tell the time; I could if I was at home.

William Shuld sworn.

Q. Are you a cartman? *A.* Yes, I have been frequently employed by Mr. Ogden. I was in his employ last winter in the month of January, when the Leander was loading. I carried down several things along-side of her; I carried cannon, boxes, barrels and bales. I cannot recollect the number of cannon I took down, I think they amounted to 30 or 40. I was obliged to have people assist me in carrying them. The boxes which I took from Price's and More's were long boxes. I carried cannon from Waltham's, from Pine-street, from Gen. Stevens' some barrels, from Stevenson's in Maiden-lane some hogsheads, which I supposed had water in them; I carried some bales from Weyman's, I think four or five; I do not recollect the number. Some of Mr. Ogden's young men gave me directions to go after these things, and they were all carried and delivered to the Leander last winter.

Emmet. These were carried publicly in the day time. *A.* Yes sir.

Q. You made no secret about it. *A.* No sir.

Hoffman. Can you recollect what time it was when you delivered these things? *A.* I cannot. I recollect I worked from morning until night, aye, until 9 o'clock too, with others, though we seldom work to so late an hour.

Q. What was the reason that you worked so late? *A.* Because the ship was in a hurry to be dispatched.

Q. Where did the Leander lay, when she was loading, last winter? *A.* She laid down by Greenwich-street, on the left hand of Rector-street.

William Weyman sworn.

Q. Are you a merchant taylor? *A.* Yes, I make clothes in large quantities, and sell them by wholesale or retail. I was applied to, to make a large quantity last winter, in January, but I cannot remember the day. Mr. Ogden and Mr. Armstrong required me to make a quantity of jackets and pantaloons. I was to make any quantity I could get done in time, which was two or three weeks, but not to exceed 11 or 12 hundred of each. The

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jackets were made of blue, and the pantaloons of ravens duck; there were more jackets than trowsers. Mr. Ogden paid me for them. They were put up in bales and delivered to Mr. Ogden's order, I do not know to what cartman. I was directed to make them all as for uniform, the collars and the cuffs were yellow, though not of all, for I believe a quarter part of them were green, and the facings of the green jackets were black.

Emmet. Did your workmen understand what these clothes was intended for? *A.* It was generally understood they were to go on board the Leander.

Sanford. Did you understand that from Ogden and Armstrong, when they called upon you and gave their orders? *A.* I cannot recollect; but it was no matter of secrecy in the city, I believe, for a fortnight before they were delivered; they were calculated for warm climates.

Colden. Are they not worn in cold climates also? *A.* Yes, certainly, the serge.

John Corne sworn.

Q. Are you a cartman? *A.* Yes. I was employed last winter in carrying articles to the Leander, among the rest there were 3 guns and 5 gun carriages, I took them from Water-street to near Rector-street, and left them along side the Leander. I got them from Maiden-lane and from Gen. Stevens.

Colden. What kind of gun carriages were they? *A.* They were for sea service, and we removed them all by day light; it was Mr. Shuld, who has just given his testimony, that employed me.

John M'Bride sworn.

Q. Are you a cartman? *A.* Yes. Mr. Shuld employed me to cart several things for the Leander. I carried down water, and 5 guns from Stevens', from Miller's and from Limmons'. I carried 3 claret hogsheads, and I know that when they were taken out of the sleigh one of the heads broke in and I saw that it contained shot both round and double headed; I brought them from a store between the Fly Market and Burling-slip. I carried long boxes from More's four or five times; they were of the kind that usually contain muskets. I saw one of them open; at least they were nailing it up when I went there, and I saw it contained muskets; I carried them down to where the Leander lay.

Colden. This was done openly. You were under no injunction of secrecy? *A.* It was all done in open day, and no secret made about the matter. Cleland assisted me.

James Cleland sworn.

Q. Are you a cartman? *A.* I assisted John M'Bride in carrying water, and 5 guns to the Leander. We carried, I think, 5

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boxes of muskets from Allen's. I saw the inside of one, and the boxes appeared to be all alike. I assisted in carrying five claret hogsheads; one of them contained balls.

John Murray sworn.

Q. Did you sell swords or cutlasses to Lewis or Ogden last winter? A. I sold some to Capt. Lewis; they were all old swords; upwards of 200 we sold them at a pretty low price; therefore we could not put any value upon them. We received them from Martinique, and we had sold several of them from time to time, and these were the refuse of the whole. I did not know Capt. Lewis, but they told me that was his name. I received Mr. Ogden's note for the amount, which was paid. I cannot recollect the date, but if it is material I will send my clerk up with it.

Emmet. They were old swords and cutlasses; they would answer for old iron, but would they answer for swords? A. I do not know; I am no military man. They were sent to me as merchandise, with other things, and I sold them as such.

Colden. Was there any secrecy in this transaction? A. None.

Augustus Flemming sworn.

Q. Do you live with Mr Murray, as a clerk? A. Yes; and I delivered those things which Mr. Murray has just mentioned, on the 3d or 4th of January last to Capt. Lewis's order. There was 253 swords and cutlasses, they had been bespoke 2 or 3 days before they were delivered.

Nevingston Greenard sworn.

Q. Did you make boxes last winter for Mr. Ogden, or by his directions? A. Capt. Lewis ordered some, and said they were for packing up of arms. He required as many as would pack up 500 stand, but I did not make them all. They were of the proper size for packing muskets; they were 5 feet 9 inches long, 20 inches broad and 14 deep. I delivered them on the 18th or 20th of January. They were applied for one day, and I delivered them the next.

Martin Boerum sworn.

Q. Where do you reside, and what is your occupation? A. I reside at Brooklyn, and I keep a gun-powder house there. I delivered 100 quarter casks of powder to the order of Wm. Wallace, and 50 to the order of Jonathan Ogden, last January or February. They were given to the boatmen, to be put on board the Leander, when she lay at Staten-Island. I do not recollect the precise day, I think it was in February. We are not permitted to deliver powder unless the vessel is in the stream; we deliver it after the vessel has cleared out.

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James Burbank sworn.

Q. What business do you follow? A. I attend one of Finiton's ferry-boats; I carried a 100 quarter casks of powder from Brooklyn on board the Leander, and 20 or 30 small arms and bayonets, some cutlasses, and some of the people and their baggage, which I understood belonged to persons on board the Leander; she then lay at Staten-Island.

Emmet. This was all done publicly? A. Yes, I was occupied in it several days; sometimes I went twice a day and sometimes once.

Mr. M'Lane was called by the district attorney and asked if this was the man he delivered the things to, mentioned in his affidavit. A. Yes that is the person.

Emmet. Is it not common for you to carry things and persons on board ships after they are cleared and dropped down? A. Yes, we are always glad to do that kind of work when we can get it.

Nathaniel Ward sworn.

Q. What trade do you follow? A. I am a ship-carpenter; I did not work on board the Leander before she went the last voyage, but I was on board the 24th January, before she left the city; I saw a good many guns on board, some in the hold as well as 18 on deck; I saw a considerable quantity of balls, and two hogsheads of double and single headed shot; I saw several boxes which appeared about the size to contain muskets, but I did not see their contents; I also saw some gun carriages, besides those that were mounted.

Emmet. There was no attempt made to conceal any of these things from your view? A. None; I had known the Leander several years; she mounted 16 or 18 guns.

John Gantz sworn.

Q. What business do you follow? A. I am a ship-carpenter, and worked on board the Leander last winter. I made a new lower deck for her, under the direction of Captain Lewis, pretty early in January; they took on board several guns, some were large cannon, and a considerable quantity of shot; there were several cases and boxes; I went down to the quarantine ground to stop a leak, and saw between decks a quantity of pikes, I cannot say how many; they were tied up in bundles with handles to them; the vessel at that time laid pretty low in the water.

Hoffman. When did you begin to repair her? A. about the middle of January, but some work had been done before I went on board.

Francis Gantz sworn.

Q. Are you a ship-carpenter? A. Yes, and I worked on board the Leander; I saw arms on the wharf, and cannon which

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were put in the hold. Capt. Lewis ordered the new lower deck to be put in.

Q. What was the object of putting in that lower deck.

Emmet. Stop, that is not a proper question to be asked.

Sanford. What is the use or advantage in putting in a new lower deck, does it render a vessel better fitted for war? *A.* It does.

George F. Hopkins sworn.

Q. Was any application made to you to procure a Spanish printing press and types? *A.* Yes; in December last Samuel C. Loudon made his first application to me for a printing-office. He then wanted Spanish characters. I procured them for him, and the whole were delivered to his order about the middle of January. But I do not know, of my own knowledge, to whom they were delivered.

Colden. Though the court has expressed an opinion that Capt. Lewis and Mr. Ogden were agents of Col. Smith, yet will they now hear testimony, from this witness, of what passed between him and Mr. Loudon, and consider Mr. Loudon also an agent, without any manner of proof, and that in regard to a purchase which could have nothing to do with a military expedition?

Sanford. The gentleman seems to think, that a printing press has no relation to military expeditions. We shall show in due time that this has.

Court. My decision was, that every thing might be given in testimony to show the fitting out of a military expedition, and whatever stands in connexion with that point, is proper testimony.

The reference which was made to the doctrine of conspiracy, does not in this case apply. Proceed,

Q. by *Colden.* You say Loudon purchased a printing-office of you? What do you mean by Spanish letters. Do not the Spaniards use the Roman characters? *A.* It was a fount of Roman, but the Spanish have an articulated letter, such as an n with a curve. It is not used in the English language, and I procured him that sort from Philadelphia. Loudon disappeared from this city about the time of the sailing of the Leander; I have never seen him since.

Jonas Mapes sworn.

Q. Are you a merchant taylor? *A.* Yes. I made several suits of uniform for gentlemen that went out in the Leander. I made two for S. C. Loudon. I delivered them to him about the last of January. They were fitting for an ensign or a lieutenant colonel, by only varying the epaulets. He ordered them himself. It is the same kind of uniform that we use for our state artillery, except the difference of the facings.

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Q. by *Emmet*. You made uniforms for him, and you have made them for others, I suppose? *A*. I made about that time uniforms for two or three other gentlemen.

Q. Did Loudon belong to the artillery? *A*. No. He was a captain in the 5th regiment; but there is no difference in the uniform of the artillery and infantry except in the facing.

Q. by *Emmet*. Were you enjoined secrecy on this subject. *A*. No.

Thomas Stokes sworn.

Q. Did you make any military uniforms? A. I made a uniform coat for Loudon. It was faced with buff. I made uniforms also for a gentleman who went with Miranda, but I do not know his name, unless it is mentioned to me.

Q. Was it Molini? A. It was Molina or Molini. I made some under cloathes, but could not consider them as uniform. The work was delivered about the end of January. I think he was secretary to Gen. Miranda.

Q. by *W. Morton*. Are you certain of that? A. No. But he paid Miranda's bill, whose work was not uniform.

Q. by *Emmet*. So you suppose it is a proof of a military expedition that the general has his cloathes made plain?

John Swartwout sworn.

Sanford, in answer to a question from the defendant's counsel. I am going to prove by this witness, the conversations and confessions of Col. Smith to him.

Q. Are you acquainted with Col. Smith? A. Yes.

Q. Have you had frequent conversations with him on the subject of Miranda's expedition? A. Yes.

Q. When was the first conversation? A. I cannot recollect particularly, but it has been often since the subject was first publicly talked of. I cannot say whether it was before or after the vessel sailed—perhaps it was both. But I rather think it was not till after the Leander had sailed.

Q. Did he say that his son sailed with Miranda?

Hoffman. You ought not to ask leading questions, but must ask generally.

Sanford. I agree that the rule is against asking leading questions, but a witness may stop short unintentionally, and it is then proper to put a question like that which I have asked.

Hoffman. If this is not a leading question, I know not what is. I refer you to Peake's Evid. 188; there you will find that you may ask, had you any conversation generally, but not did he say so and so. The witness in reply ought to give the whole conversation, for the several parts might explain each other. You are not to select one part and leave the rest.

Q. What did Col. Smith say to you on the subject of this expedition, in the several conversations you have had with him? A. It

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is impossible for me to repeat the whole of the conversations, or say the whole of what passed between us. When the capture of the two schooners was heard of, I asked him about his son, and though I do not recollect the particulars of that conversation, the result to my mind was that his son was on board with Miranda. But I do not recollect that he said that he was on board. We talked on the subject several times, and this opinion I gather as the general result. About the same time I talked with others, and the opinion I formed perhaps was the result of all these conversations. I cannot say he ever told me his son was on board, though I believed he was.

Q. What did you understand from him as the nature and tendency of the expedition? A. I understood it to be destined against Spanish America, or the Caraccas.

Q. For what purpose? A. I understood for revolutionizing the Spanish colony; but whether that impression arose from my conversation with Col. Smith, or others, I cannot determine. It is probable then that it might be from him, but I cannot speak positively. I never wished to ask Col. Smith a question on this subject since the indictment has been commenced.

Q. Do you recollect any thing more on this subject? A. It is probable that much more was said, but it is impossible for me to recollect it.

Q. Do you recollect whether you conversed with Col. Smith on the object of this expedition, before it became notorious? A. I do not recollect that I did.

Q. Did you, before the examination before the judge, on the commencement of this prosecution? A. Yes, I think I did; but it is so mingled in my mind with other circumstances that I cannot say positively. I believe he mentioned to me while Miranda was here, that the object of the expedition was to revolutionize the Caraccas. Col. Smith and Gen. Morton both mentioned it to me, or it was in company, that it was mentioned that it was his object to revolutionize the Caraccas. The first person who told me of it was, I think, Col. Smith; the next Gen. Morton. This took place on the 25th of November, at a corporation dinner, where Gen. Morton mentioned to me that Miranda had been invited as an officer of distinction.

Q. Did he inform you how he was to effect this purpose? A. No. But I understood from him since, or from the public prints, that Miranda was to be aided by the British.

Q. by *Hoffman*. Did not Miranda leave this city and go to Washington, after the 25th of November? A. Yes.

Q. by *Colden*. Did not Col. Smith tell you that the vessel Miranda went in was bound to Jacquemel, as well as the Caraccas? A. Yes.

Q. by *Colden*. A number of gentlemen were invited to the corporation—were they gentlemen of distinction? A. Yes; and

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Mr. Morton said that Miranda was a distinguished officer, in consequence of a question being asked who Miranda was. I do not recollect the members of the corporation who were present, but I remember that a toast was given wishing him as much success in South America, as North America had in our revolution.

Q. by *Colden*. In these conversations, of which you have spoken, did you understand that the expedition was set on foot with the approbation of the government of the United States?

Sanford. We do not object to this question as it relates to any one conversation between Col. Smith and the witness, and any part of which the witness has related, but we object to the question as applying generally to any conversation whatever which the witness may have had with Col. Smith.

Emmet. We do it in the way that you have conducted your examination, in order to get the truth out of the witness by aiding his memory.

Colden. I understand the objections to this question are that it is too general, and that it is a leading question. It is too general, because it relates to all the conversations that may have passed between Col. Smith and the witness. But it must be recollected that the witness has not attempted to detail any one conversation that passed between him and the defendant; on the contrary, he has told us that he could not recollect what passed between them at any one time—and he has only given us the impressions which were made on his mind by all their conversations taken together. Now if the public prosecutor is to have the benefit of these impressions so far as they may be favourable for him, shall we not be intitled to the same kind of testimony, so far it may be favourable for us. Had the examination of the witness been confined to any particular conversations, undoubtedly we could only have inquired as to what passed in these conversations. But when the witness has been asked by the gentlemen on the other side, what he understood from all the conversations generally, certainly we must have a right to put the same general question. As to its being a leading question, it must be remembered that the witness is now on his cross-examination, and upon a cross-examination we have a right to put leading questions. For the law on this point, we again refer to Peake, 188.

Sanford. It is the law that where a witness swears to a conversation or the admissions of a defendant, the whole is to be taken together. But that does not comprehend the right of putting questions on the cross-examination not relative to the issue. Questions connected with the cause, I am willing to admit, but not those which are unconnected with it. It is necessary to adhere to the rules of evidence, but this would be a violation of all rules. It would produce the absurd effect that the defendant might make testimony in his own favour, by subsequent declarations. This would involve a violation of fundamental rules of evidence,

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Colden. With permission of the court, I will put our question in such a way as that the extent of our inquiry may be distinctly seen. In these conversations, from which you collected the testimony you give with respect to the destination of the Leander, did not Col. Smith tell you that it was set on foot with the approbation and consent of government?

Edwards. It is competent for them to show what occurred in any one conversation, but they shall not garble the conversation; that is the rule of law; it is founded in good sense and strict justice. Mr. Swartwout has been called upon to say what conversations and confessions had been made to him by Col. Smith: his answer is, that he is not able to relate particular conversations, but he collects a result from the whole. I find no fault with the testimony given in this way; but if he answers the particular question as it is now put, he must do it in connection with the whole, and must give us time and place.

TALMADGE, J. It is proper to examine the witness on any particular conversation, of which he must relate the whole, as far as his recollection serves, and then particular interrogations will be proper.

Colden. Then, I trust, his testimony, as to conversations between him and the defendant, will be rejected altogether; for he has repeatedly said he does not recollect any one conversation. Is it intended to receive or reject the whole of his testimony?

TALMADGE, J. That is a subject for after consideration; no doubt, it will have all the weight it is entitled to.

Emmet. We ask, whether the whole of Mr. Swartwout's testimony is not legal; or is it to be abandoned, because he cannot particularise each conversation, but speaks only of the general result? We ask for the same latitude in our inquiries as has been indulged to the public prosecutor.

TALMADGE, J. It is proper to interrogate the witness as to the conversations which he has had with Col. Smith, on all matters relevant to the issue. The conversation at one time might be of one kind, at another of another; they mutually explain each other. But if he says that he does not recollect the conversations, it is proper to put questions that may remind him of it.

Colden. Then the court overrule the question?

TALMADGE, J. No, I do not.

Colden. I will then again state the question as I conceive it would be proper. From the several conversations you have had with Col. Smith, did you understand that the expedition was fitted out with the knowledge of the president?

TALMADGE, J He may answer that question if he can identify the particular conversation.

Colden. Can you identify the particular conversation? *A.* No, I cannot; the testimony I have given is the general result of the conversations I have had with Col. Smith.

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Hoffman. Do you undertake to say that this is a result from the whole of your conversations? *A.* I think it is.

Emmet. In those conversations, was there any that led you to believe that he had the approbation of the president?

Edwards. This is an insidious mode of examining the witness; let them point to the particular conversation, and then ask their question.

Morton. I consent to leave the question where it is; the difficulty which is made by the counsel for the prosecution to our obtaining an answer, is itself an answer.

Emmet. Have you in any of those conversations formed an opinion that the expedition received the approbation of the president?

Edwards. That is the same question only in another garb.

Emmet. I pray the decision of the court.

TALMADGE, J. He must answer from his positive knowledge, not from his opinion.

Emmet. Have you then a positive knowledge of any particular conversation in which Col. Smith mentioned he had the approbation of the president?

TALMADGE, J. Have you any recollection of a particular conversation respecting this expedition? Repeat the whole of that conversation.

Emmet. Can you recollect any particular conversation respecting the destination and the object of the expedition by the Leander?

Edwards. You are to state what you know of the destination of the Leander; but did he ever mention to you, in any particular conversation, that those circumstances were known to the president? If so, repeat the whole.

TALMADGE, J. The question must certainly be understood by this time.

Swartwout. I never heard him converse on the subject of this expedition, but that I understood from him, that he believed, from Miranda's representations, that government winked at the expedition; and he has complained to me since of this prosecution, as Miranda always informed him that government winked at the expedition.

Sanford. Did you understand that the Leander was used to carry on the expedition from this city? *A.* Yes.

Sanford. Did you understand that she had arms, ammunition and military stores on board? *A.* I did, but I cannot tell whether I received such information from Col. Smith, or gathered it from the general conversation of the city. I cannot separate these circumstances in my mind.

Sandford. Did you understand from Col. Smith that he had engaged men to go on the expedition? *A.* No.

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Emmet. Can you give any detail of the conversation respecting an interview between the president and Miranda? *A.* I understood from Col. Smith that Miranda had waited on the executive, and was informed that government would wink at it.

Sanford. Did you draw your information upon this point from Col. Smith, or from other sources? *A.* I drew it from Col. Smith.

Emmet. Was it then universally understood that the Leander was taking in military stores? A. I heard it from several persons.

Sanford. Did you understand the extent of the means Miranda took out with him? A. I understood he had men and arms.

Sanford. Did you understand that Miranda was to be at the head of the expedition? I thought so, but I dont know whether Col. Smith informed me.

Hoffman. Do you remember whether you were informed by Col. Smith that Miranda dined with the president and the secretary of state? A. Yes.

Hoffman. Did you understand that Miranda was pressed to stay a day or two longer at Washington, after he was prepared to return to this city? *A.* Yes, I understood so from a letter Colonel Smith received from him.

Hoffman. Do you remember the date of that letter? *A.* I cannot say.

Hoffman. Was there a letter from Miranda, desiring Colonel Smith to conduct himself with secrecy? *A.* I was informed there was such a letter.

Hoffman. Throughout the whole of these conversations, did he not uniformly state that he was acting with the sanction and approbation of the government? *A.* Yes, no doubt, but I never questioned him as you do me. What I state is to be more relied upon as the general result, than any particular or precise information I had from him. I thought that Miranda's project was to revolutionise South America, but how I got the idea I do not recollect.

Hoffman. Did Colonel Smith tell you the Leander was bound to Jacquemel? *A.* No.

Richard Platt sworn.

Q. Are you acquainted with Colonel Smith? *A.* Yes, for thirty or forty years. I have frequently conversed with him on this subject. We had conversations at the time Miranda was said to be in Washington; perhaps it was in December last, and frequently since.

Q. What did he say in December? *A.* I will give the court my general impressions on the subject. I understood this to be a British expedition, under the direction of Miranda, that he

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came to this country in order to carry it into effect, and went to Washington to co-operate with the American government, when he at that time stated it to the president, who had full knowledge of the design. In answer to which the government said, it was not expedient for the country to go to war, but that he might go on with his plan as he pleased.

Q. Did you know the Leander was fitting out? *A.* I heard it from all the world. Miranda applied to Smith first, he referred him to Lewis, who said he could do nothing without Ogden.—This occasioned the introduction of Ogden to Miranda. This is all I know which relates to Colonel Smith.

Q. What did you understand was the destination of the expedition? *A.* I understood to Trinidad, and from thence to the Caraccas, and was very much surprised when I heard of their arrival at Jacquemel. I heard that he was to be supported by a large British force. I was confirmed in the suspicion that the government was acquainted with the expedition from Duncanson's letter, in which he informed Colonel Smith that he had just seen Tom Jefferson. I remarked it because he used the plain word Tom; and that he would shortly have it in his power to give him a military command. I then did not doubt the secret co-operation of the government. I did not understand the extent of the arming, but believe that it was confined to the single vessel, the Leander. There was a chest to come from Trinidad, on which I kept my eye. There was no danger he said; there were two vessels to join her. Therefore, I concluded that the whole business was understood by all parties. I connected this with the conduct of Armstrong and Williamson, who I understood was raising a regiment in Bermuda. I understood that Smith's son, was to be adjutant to Miranda; that the officers from here were to travel, but were to be joined by other officers at other places, and thence proceed to Caraccas.

Hoffman. Was it not the general conversation that she was going to be joined by the British? *A.* It was the general impression ten or twelve days before.

Q. Did you expect Miranda was to be received when he arrived at the Caraccas? *A.* I understood that the plan was to be so guarded, that Miranda was not to land unless the people were ready to join him; the whole plan was submitted to the government.

Q. How came you to understand this? *A.* Colonel Smith had shown me Miranda's letters to him, from Washington. I believe them to be genuine, but I do not know whether the statements they contained were facts or not.

Hoffman. Did you not understand Smith's name was mentioned to the government? *A.* Yes; I understood to Jefferson and Madison; they admitted that Smith was the most suitable per-

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son in the United States. The government said he might do as he pleased; he was a public officer and might go if he chose.

Hoffman. Do you know that Miranda wrote at Washington of his intentions to go? *A.* Yes; ten days before.

Hoffman. Does the letter refer to the secrecy with which he carried on the expedition? *A.* Yes; and he desired Colonel Smith to preserve his usual secrecy in any conversations he might have with his friends.

Q. Did he apply to Smith to secure him a vessel? *A.* I understood that he asked Smith to procure him a ship, who introduced him to Captain Lewis, and he to Ogden. I do not believe he had any thing to do with it, as he never told me he had. He was charged with enlisting men, but said he had nothing to do with men or money on the point of enlisting.

Mr. M'Lane again.

Sanford. I shall now proceed to the agency of Colonel Smith.

Q. Did Colonel Smith apply to you to procure artillery, or artillery-men? *A.* It was some time in January, after I went to Washington. Lewis had been to my house, and different persons; sometimes in the night, and sometimes by day. The moment Lewis found I was returned from Washington, he called upon me, and after some conversations, asked me if I could keep a secret.

Morton. We do not ask for conversations. What passed? *A.* Various persons called on me from time to time. I cannot say any thing whether a line I received from Colonel Smith was without a signature, for I believe the paper is lost. I avoided conversations on this subject, as I set my face against them all. But as to the contents of the line, it was begging me to call on Colonel Smith; and after getting my business arranged, I waited on Smith; he touched the business of procuring artillery-men and artillery which might be used in the field or garrison. He inquired also for smiths, wheelwrights, carpenters, and artificers in general, but did not explain for what purpose he wanted them. He wanted three or four of these to be acquainted with the practical use of artillery. I declined all interference, as far as this, I knew of none such as he required, but those who worked with me. I however mentioned it to two or three young men, told them they had better call down on Colonel Smith, and talk with him. It was pretty much towards the last of January. It was previous to the ship's leaving the dock; but whether cleared out or not, I cannot positively say.

John Fink sworn.

Q. Do you know Col. Smith? *A.* Yes. He applied to me last winter to enlist some men, or rather to engage some men for government service. I told him I did not know of any men. But

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a few butchers were idle. I was to give the colonel news the next morning. Instead of six, as he told me yesterday, there was wanted twelve men, a sergeant and corporal. They asked a good price, it was $15 per month. There were fourteen at that time and went on as far as twenty. I was authorised by him. He represented to me that they were for the service of the United States, but it was afterwards found they were to go on board the Leander. He would not tell us where they were going to. He said he could not disclose the particular object. That he could have a great deal of money to explain it to a certain man, and therefore could not tell the sergeant or me. These men saw Col. Smith. Several of them, not all. I saw him often; he said they were to go on a detachment. They boarded at my house. His son was to command the company and had a commission for to go. I have seen Smith several times at my house. He shewed me a bundle of papers which he said were his orders to get these men. Smith informed me that an expedition similar to this was to go from other states. He said his son was a captain. They went on board; the mate abused them, and they would not stay. There was fifteen dollars and a half a piece given to them. There were twenty of them. I received this money from Col. Smith. He put it in parcels for each man, and delivered it to me for them. It was for a month's pay. The men came to my house after they left the Leander. They said they would not go on board the vessel.

Q. When on shore did Col. Smith or his son come to notice them to go on board? *A.* Col. Smith told me to say if they would not go on board the ship, he did not want them. They might make a new agreement with Capt. Durning. He was nominated to the command. As Smith was to be an aid, Col. Smith said he was going to take the command of this expedition, in the spring. They were to serve as cavalry, as the general's guard. I was informed that horses were prepared for them, where they were to land, and that clothes and every equipment belonging to a horseman was on board.

Q. by *Hoffman*. They returned from the Leander to their different quarters? *A.* Yes.

Q. Then it was stated to them that they need not go unless voluntarily? *A.* They made a new agreement with Durning as Smith was become an aid.

Q. by *Hoffman*. Was it intimated to them that they would stop at a place where they would have an opportunity to return, if they did not like the service? *A.* I believe it was mentioned to them.

Q. by *Colden* Was it not communicated to them that when the vessel arrived they would be at liberty to return, and a passage be provided for them, but that he could not tell what part they would be sent to? A. Yes.

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Q. by *Hoffman*. Recollect yourself. Did you say that Col. Smith told you he wanted to *engage* them for government? How was that? Had you not just before engaged men for government? A. These were the first men that I raised.

Hoffman. Was the bundle of which you spoke, a bundle of orders or letters? A. He had two letters besides; those were orders.

Q. by *Colden*. When did you first see Col. Smith on this subject, and how came you to have the interview? A. He sent for me, and told me that he had been looking for me for two days past, and wanted me to get five or six men for the general's guard, and that his son was to be captain of the company.

Q. by *Colden*. Did you ever see the sergeant and Smith together? And did the sergeant then ask him where the detachment was ordered, and whether it was for the service of government? A. Yes, that was what he said.

Q. by *Emmet*. Was you never under any apprehension of being prosecuted for this transaction? A. Never.

Q. by *Emmet*. You thought him then a good man, and that he had the approbation of government; how came you to believe this? A. I called upon the Colonel, and he showed me his orders.

TALMADGE, Judge. I will submit to this mode of examination, if it is with the consent of the district attorney.

Emmet. I submit to the court, but I beg to understand what there is illegal in my course of examining the witness.

TALMADGE, Judge. The question is irrelevant to the point in issue.

Emmet. Then I am ignorant of the manner of examining into the credibility of a witness, and therefore excuse myself from my ignorance.

Peter Rose sworn,

Q. Did you sail in the Leander on her last voyage? A. Yes. I was employed by Capt. Gardiner, who told me he wanted me to go to New-Orleans—that we were to sail from here to Washington, and go from Washington by land.

Q. Have you been at New-Orleans? A. No.

Q. When did you discover the Leander had a different object in view? A. As soon as I got on board; and I wanted to return, but they would not let me—they would not allow me even to send a letter ashore.

Q. Where did you go to? A. We went to Jacquemel first, and remained there five days.

Q. Who was with you, and what number of men had she on board? A. There was Lewis, Miranda, Armstrong, Gardiner, Durning, and Loudon, and many others—I cannot recollect the number of men, but I think there was near three hundred.

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Q. Was there a printing-press on board ? *A.* Yes, and it was set up on board at Jacquemel, and something printed there ; it was in Spanish, and in the form of a proclamation. It had Miranda's name at the top. The papers were put up in boxes and kept on board the ship ; but there were some put on board the schooners. None of the arms were disembarked at Jacquemel, nor was any mercantile business done that I know of. I was employed in putting handles to the pikes that were on board, and repairing several small articles. She went from Jacquemel to the island of Aruba, near the Spanish Main ; we went in there to get provisions and water. Two schooners were with us chartered by Miranda, the Bacchus and the Bee ; one had a nine-pounder, the other had nothing but small arms. They did not let us know where they were bound. We left Aruba and went towards the Spanish Main, and came off Porto Cavello. The people were sent on board the schooners to land. We had a pilot with us, whom we got at Aruba. It was also the intention to land the men from on board the Leander ; but what prevented us from landing was, we met with a brig and a schooner while we were laying to ; we saw them the day before. The pilot was mistaken in the place where we intended to land. We stood off from the shore, and when they came within gun-shot we fired upon them ; we fought for half an hour ; they followed the small vessels, standing down the shore, and engaged them ; we saw the schooners strike their colours ; and some of the people said they saw the boats hoisted out, but I did not. We could not overtake the two Spanish vessels. We were reviewed the next day after the engagement, and went to Bonaire for water, where we layed one or two days, and then sailed for Trinidad ; there we met the Lilly, and went with her to Grenada and Barbadoes. I was informed that Miranda issued commissions to his officers before we sailed from Jacquemel. He had no opportunity of landing any proclamations from the schooners. When at Barbadoes we had some of our men taken out by the British, against the consent of Capt. Lewis, but with the consent of Miranda, as I was informed. Three Spaniards were sent on board. The people were generally dissatisfied with their situations, and some of them, at Barbadoes, were desirous of being released. I believe he refused some. I know he refused to discharge me ; but I got my discharge from Captain Lewis. He threatened to put me on board of an English man of war, and have me put in irons. There were a great many small arms and muskets on board, which were never secured till after the engagement, and then they were taken up in the steerage. I cannot tell how many guns there were on board, but there was a great deal of shot. There were about 3000 pikes ; I put handles to 700 of them myself.

Miranda was called commander in chief; Armstrong colonel ; Kirkland a colonel ; Durning was to be captain of the dragoons ;

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the two Loudons were officers, and Willet was to command a corps of riflemen. I do not know how many officers there were, but I think there were more officers than men. I am a native of Vermont, and never at sea before. I was very glad to get away and return.

Hoffman. The two schooners which sailed with you, how were they equipped? *A.* In part from what the Leander had carried out; there were ten or twelve men put on board—I think not more than twelve.

Hoffman. How many men do you say there were on board? *A.* I am pretty sure there were 200; the steward said there were 300.

Colden. Did you understand they were bound to Jacquemel? *A.* Yes; and afterwards I understood it was the original intention to recruit an additional force there.

Q. Were you all landed at Aruba? *A.* We were all landed by the general's orders.

Q. Did you go on board again voluntarily? *A.* Yes; the people were pretty much satisfied; but he did not give us our choice to go or stay. Aruba belongs to the Dutch.

Emmet. You made a number of handles for pikes and hatchets, I suppose they were not in a fighting condition when you left New-York, or even when you were at St. Domingo. *A.* They were not.

Emmet. Then I presume you mean to say, that he could not have carried on the enterprise, to which you supposed she was destined when she left New-York, but it was first necessary for her to touch at St. Domingo. *A.* The arms were all rusty and out of order, and in no condition prepared for a military enterprise.

Tuesday, July 22d.

Richard Platt, in order to repair an error he had fallen into yesterday, wished to be permitted to show the original letter from Capt. Duncanson, which Col. Smith had put into his hand. The letter was produced and read accordingly, as follows—

"DEAR SIR,

"I understand that something must be done against the enemies of my adopted country. I this morning called on Mr. Jefferson. I am at your service, if you stand forward, and I think you will, if the old adage is true, that "the old coachman likes the smack of the whip;" or as the East-India Rajahs end their letters, "What more can I say."—Yes I can. My best wishes for the health and happiness of Mrs. Smith and your family.

"With great regard and esteem,

"Yours truly,

"W. M. DUNCANSON.

"Washington-City, 20th Dec. 1805.

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"An answer is asked. You know I ought to have an immediate answer."

Sanford. Then you retract what you said yesterday about Mr. Jefferson and Col. Smith, and that Col. Smith would have it in his power to give Duncanson a military commission. *A.* I retract every thing on that point; the letter can speak for itself. My impressions were strong at the time; I see Mr. Duncanson has not said Tom Jefferson, but Mr. Jefferson. I don't recollect whether I read the letter formerly, or whether Col. Smith told me its contents.

Sanford. You said that the president advised that expedition. *A.* I meant to state the impressions that Duncanson's letter had made on my mind; now you have the letter and it will explain itself.

A Juror. Then what you have said before is to be considered as unfounded, and the testimony is what this letter contains? *A.* Yes; I let it stand as the letter states it.

Sanford. Now I ask you, how you understood Smith, when you said that he thought he was acting with the consent of the executive? *A.* My testimony purports no such thing. I thought the government knew as much of the thing as Miranda; for from the information from Washington, I could have no doubt but that he had communicated it to the president.

Emmet. What was the general impression on your mind, with respect to our situation with Spain? *A.* My general impression was that the war system would be adopted.

Edwards. That is an improper question to be asked; what have we to do with his general impressions?

Emmet. Mr. Platt says that he was impressed with the idea that Mr. Smith acted with the approbation of the president; it is therefore fair to ask him what produced those impressions.

Edwards. Let us have the facts, and the jury can tell whether they would warrant the impressions.

TALMADGE, J. The ingenuity of counsel is not to regulate the course of the witness. State any fact you know that goes to show that the government had any thing to do with the expedition. *A.* Col. Smith always expressed to me his full persuasion that he was acting with the consent of the president.

Doctor Douglass sworn.

Q. Do you know Col. Smith? A. Yes; and I know there was a number of young gentlemen went out in the Leander who had interviews with Col. Smith before they went. I understood that Col. Smith had the nomination of some young men to Miranda. Either after he went, or about the time, he said that the general was going home to his grand-mother, and wanted a number of young men to attend him—his son was to go, and

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he mentioned to all, that after the plan was opened to them, they might chuse whether they would go or not.

Q. Did he say that he was authorised by government? A. Yes, expressly; and I understood these young men were going out as officers to the country where they were bound. I knew ten or twelve of the young men; and I believe they were all to have a command. I knew many of them personally.

Q. Did Smith give you any other account of this expedition? A. It was my early impressions that it was for some hostile purpose. Shortly after Miranda arrived, he went to Washington; and Col. Smith mentioned to me that he had an intention of going to Washington, to converse with the president—I told him I would accompany him. Next day he left word at my house that he wanted to see me; when I saw, him he told me that the object he had in view in going to Washington, was completed—that another gentleman had seen the president, and made the necessary arrangements. He did not mention the plan that was to be pursued, but he told me he would; and he desired if I knew of any medical men willing to go abroad, I should name them, which I did. In the course of some few days these gentlemen called upon Col. Smith—they called to know what was the plan of Miranda; that if the government permitted it to go into operation, they would go with him. They brought other young men to me, and asked me to name them to Col. Smith—I told them that the young gentlemen who brought them, knew more about the business than I did. They went to Col. Smith, and he assured them that he was authorised to do what he was doing. They engaged to go out with Miranda, but they was to go to a friendly island, from whence they might return, if they did not approve the project. I requested the young gentlemen not to bring any more to me, as they knew more about the circumstances than I did.

Sanford. Did ten or twelve gentlemen go? A. Mr. Cutting, Mr. Robertson, and Spencer did not go out, the others went. Col. Smith stated that there was a co-operation on the part of government; that though he was unwilling to leave his office, he had consented to let his son go.

Q. Did Smith engage these men? A. He mentioned to them that what he said, the general would fulfil; after he left this country these gentlemen all wore swords. The jury can tell the amount of this arrangement, as well as I can.

Harison. Were they referred to Miranda? A. I don't know, but I heard say.

Edwards. Heard say is no testimony.

Harison. What were the things that Smith said should be performed by Miranda? A. They were to receive pay, and to be appointed officers. Mr.—— sailed with Lewis as surgeon of the ship—and that they were to have liberty to return, if they did not chuse to go further. Their passages would be provided for them.

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Sanford. What military commissions had they? A. I heard them call one another lieutenant and captain; that Col. Smith had promised that Miranda should make them such. Every one should have the situation to which he was recommended by Col. Smith.

Sanford. What was Sands to be? A. I think I understood Smith to say, that if he found him a very clever fellow, he would make a major of him.

Q. How many surgeons and physicians went? A. There was a doctor and surgeon mentioned, but they did not go, one only went.

Q. Did they represent this as any thing more than a recommendation from Col. Smith to Miranda? A. Nothing more.

Q. Did the men that were engaged to go quit the first engagement, and then enter under Durning? A. I understood so. I saw Durning with them, but I did not see Durning pay them any money. I know nothing of the agreement; but as they were passing down to the boat, I understood an explanation had taken place, and they were now satisfied, and were now going on board with him. They had been dissatisfied before, I understood, because they did not know the object of their engagement, and they had received some ill treatment from the officers on board the ship.

A desultory conversation took place, between the counsel on both sides, on the legality of testimony, and the court gave its opinion, that the witness should give his testimony on those points which he knew of his own knowledge, and not of his belief, though he had a right to follow up his story in relating what Colonel Smith had told him.

Hoffman. How did you understand the word dissatisfied? *A.* I think I have stated all I knew on this point already; they did not understand the object for which they were engaged, and they were not treated as well as they expected to be.

Hoffman. Are you not the intimate friend of Colonel Smith? *A.* Yes.

The district attorney closed the testimony on the part of the United States, for the present. Mr Colden asked leave for the defendant's counsel to retire a few minutes to consult, which might be a saving to the court. It was granted, and the counsel returned in about ten minutes.

Colden. May it please the court. It is not gentlemen of the jury, without some surprise, that I find myself called upon at this moment to address you. For, notwithstanding the number of witnesses that have been produced by the counsel for the prosecution, and the mass of testimony that has been submitted to you, I did not think it possible that Mr. Attorney would venture to rest his cause upon the evidence as it now stands. The guilt of the defendant has been spoken of with so much confidence, the

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gentlemen have seemed to triumph so much in the strength of their cause, that I could not but believe that they had yet something in reserve, which would afford them better grounds for their apparent reliance on having your verdict against the defendant. But the public prosecutor having thought the testimony he has offered sufficient for his purpose, we are now put on our defence. We might, gentlemen, if it were necessary for us to do so, trust to the insufficiency of the testimony of the prosecutor. The defendant might boldly say, you have not proved upon me any guilt; no proof of innocence can therefore be required of me.

I shall, however, reserve all observations on the testimony now before you for a future stage of this affair. You have been, no doubt, attentive observers of what has passed in this court, while you have been attending here as jurors, and you must be apprised of the nature of the defence, which the defendant supposed he had it in his power to make, and which he would make, had he been allowed the means of doing it. We did expect to have shown you by the most conclusive evidence, that the acts of the defendant which are now, by this indictment, charged upon him as crimes, were done with the sanction and approbation of the president of the United States. If the testimony which we shall now offer to you on this point, shall fall short of what you may have expected, you can be at no loss to account for its deficiency.

Had the witness whom we have subpœnaed been compelled to appear the whole mystery of these transactions might have been explained, and the cause would have appeared to you in its true colours. But though we have not been allowed to avail ourselves of that right to have compulsory process for obtaining our witnesses, which we verily hoped was secured by the constitution to every person accused; still we are not altogether without testimony, and if we shall be permitted, we shall establish, by the most respectable and conclusive testimony, that the president of the United States, and the secretary of state, had knowledge, at least of Miranda's expedition, and that they were intimately acquainted with all his views and designs. Besides, gentlemen, as you have heard from Mr. Attorney, this prosecution cannot be maintained unless it does appear to you that the United States were at peace with Spain when this expedition was set on foot. To show the real situation of this country, in relation to the Spanish government, we shall avail ourselves of some important public documents; I mean the message of the president of the United States to congress, at the opening of the last session, and a variety of other documents which were transmitted by him to congress at that time, and which, with the permission of the court, I will now read.

Sanford. We object to their being read, if the court please. The message of the president might be evidence to congress of

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the situation of our country, but it is not addressed to a court and jury. Every question of this kind should receive the decision of its proper tribunal; the questions involved in the president's message have received such a decision, and therefore must be at rest. We found ourselves in this objection upon the decision of the court, before whom it was fully discussed. But the counsel has not told us how he means to apply the message and documents. Is it for the purpose of setting up a justification? The court has determined that they are inapplicable for that purpose; therefore they cannot go as evidence to the jury.—They first attempted to maintain that the government sanctioned this expedition; that not being permitted, they now mean to show that they had a right to decide upon the president's message, whether we were at peace or at war; a question which is the exclusive province of congress to determine.

Colden. There is nothing in the decision which the court has made which precludes the testimony we offer. If there be, I have totally misunderstood the honourable judge who delivered the opinion of the court. We offered as a justification or excuse, to prove by the testimony of the witnesses whom we have subpœnaed, that the president of the United States sanctioned and approved the acts for which the defendant is now to answer. The court decided, as I understood, that although the witness should be able to make this proof, yet, as the sanction or approbation of the president would be no justification or excuse, the court refused to grant compulsory process to bring up witnesses, whose testimony, in the opinion of the court, would be irrelevant. But the question now before the court, is totally distinct from any that has been agitated, and has received no decision.

We acknowledge, that the purpose for which we would introduce these documents, is to show, that at the time the expedition mentioned in the indictment was set on foot, this country was not at peace with Spain, or, which is the same thing, that Spain was not at peace with us. The court observed that we had not stated in our affidavit that we expected to prove by the witnesses we have subpœnaed that we were at war with Spain; and therefore, the court thought we could not say that their attendance was material on that ground. But, if I am not mistaken, it was to be inferred from the argument of the judge, who delivered the opinion of the court, that if we had stated in the affidavit that we expected to prove this fact, viz. that there was war with Spain, by the witnesses we have summoned, then their testimony would have appeared material, and the compulsory process we applied for would have been granted. It is true, it was the opinion of the court, that the power of declaring war vested entirely with congress. And that the president's declaration could not place us in a state of war. But this is very far short of saying, that we may not show, by any competent testimony, that there was an actual

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state of hostility between this country or Spain, or rather that Spain had committed agressions and hostilities against our territory, commerce and citizens, which amounted to actual hostilities, or a state of war on her side at least.

TALMADGE, J. The court made observation but on the materiality of the witnesses; they did not go to this point, but that you were not entitled to parol evidence to prove that the country was at war.

Colden. I understand the decision of the court as I have stated it. And cannot presume that we shall not be allowed to show, that the United States were not at peace with Spain. And if we can prove that at the time that this expedition was fitted out, Spain was in open and violent hostility against this country, whatever may have been the disposition of this country to remain at peace, however reluctant she may have been to make a declaration of war, however patiently we may have been inclined to bear the wrongs and violence that was offered to us; yet without our will, and against our consent, there was an end to our peace with Spain. For we could not have been at peace with Spain, when Spain chose to be at war with us.

We shall read these documents, then, to show what was the actual state of things between this country and Spain; and shall rely on these official communications of the executive, as the highest evidence of the facts which they state. For as they are made to congress by the president, in obedience to that part of the constitution which directs, that he shall, from time to time, give to the congress information of the state of the union. There can be no higher evidence.

Nor can there be an objection to our reading these documents from the newspaper which we have in court; which must derive some authenticity from its being the newspaper of the government, so far, at least, as being selected for the publication of its laws. In England the gazette is received as evidence of the public acts of the government. (Rex v. Holt, 5 Term Reports 442.) In the case of Thomas Cooper, in the Pennsylvania circuit court, this kind of testimony was allowed; and in 8 State Trials 212, the case of John Quelch, paragraphs from the London Gazette were read, to show that there was peace between Portugal and England. Though I do not much rely on this last authority, because, although the gazette was read, yet when an objection was afterwards raised to the testimony, the court seem to have thought it unnecessary to decide whether it was proper or not.

As we offer this testimony merely to show acts of hostility against this country, on the part of Spain, it will be obvious that it does not raise the question, whether the president can put the country in a state of war, without the assent of congress. We mean to prove, that without the will, or approbation, or act of the president, or of congress, there was a war *de facto* with

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Spain. And if so, then the defendant was not guilty of fitting out an expedition against a power, with which the United States were at peace.

Hoffman. I did not expect any objections would be made to the proof now offered. I understood the opinion of the court on the motion to postpone the trial, as effectually deciding on the competency of the proposed testimony. The judge, who delivered that opinion, stated, as a reason why the trial should not be put off, that the affidavit did not allege that the witnesses could prove the existence of war between Spain and the United States. The statement of this fact was unimportant, if war could only have existed by an act of congress; for, in that case the court must have taken judicial notice of such act. The remark, therefore, could only have applied to a war, whose existence was to be proved by circumstances and facts, independent of any legislative act; by *circumstances* and *facts*, proper for the consideration of a jury, and which, like all other matters *in pais*, should be submitted to them, under the charge of the court. It certainly was said by the judge, and in express terms, "that Spain could not be at war "with the United States, and they at peace with Spain." But, notwithstanding the reasoning adopted on that occasion, and the conclusive opinion of the judge, which I have just mentioned, it seems we are again to discuss the question, whether the United States can be at war, without a declaration of war by congress. The objection now made, goes to exclude all testimony of the fact, excepting such a declaration.

It must be granted, that Spain would not be prevented by our constitution from committing aggressions; nor would her monarch trouble himself even to read that instrument when inclined to commence hostilities with the United States; and, profoundly as I respect the talents and ingenuity of our learned opponents, I apprehend it would be difficult even for them, to persuade any person of common understanding, that Spain would wait for an act of congress to authorise her to make war on the United States. We have only then to alter the manner of stating the question, and all difficulties vanish—Could Spain be at war with us, and we at peace with Spain? The answer is self-evident, and testimony ascertaining that Spain was at war with the United States, is all that is necessary to establish the fact of absolute warfare between both nations, and ought unquestionably to be received. The message of the president, with the documents officially submitted by him, tend directly to establish, that Spain had commenced hostilities against the United States; not merely acts of violence and predatory aggressions by her subjects, but open and avowed warfare, permitted and authorised by her government. In that message and its accompanying documents, therefore, we offer the best and highest proof of the fact. By the third section of the second article of the constitution, it is

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make the duty of the president, "from time to time, to give con-"gress information of the state of the union." This provision embraces equally the external and internal situation of our country: the president therefore discharges an official duty in communicating to congress our relative situation with foreign powers; and his communications form the highest evidence of facts, of a public or political nature. They must be received as such, when necessary for the purposes of defence in a criminal prosecution. Unfortunate indeed, would otherwise be the situation of an accused individual, who, having acted under their authority, is refused their production, as exculpating testimony, and is punished for a laudable confidence in the declarations of the first magistrate of the union.

Again. The constitution declares that "THE EXECUTIVE "POWER shall be vested in a president of the United States of "America." Is it not a branch of the *executive power* to declare the condition of the nation, particularly as it regards foreign governments? If not, to which department of our government is this power intrusted? Not to the legislative department, for it holds no intercourse with foreigh nations, the president being the sole *organ* of such intercourse—to him, likewise, belongs the right of interpreting all treaties between foreign governments and our own—of deciding upon the relative duties of one to another—and of enforcing their performance. The executive department alone, therefore, can declare, in the first instance, the political state of our nation; whether it be hostile or pacific. Such was likewise the opinion of our Washington, and he acted upon this principle in his proclamation of neutrality, issued during the early stages of the French revolution; wherein he declared the condition of the nation, as it regarded France. By some it was pretended, that he had exercised an unconstitutional power; but the measure received the applause of every true friend of his country, and the approbation of its constituted authorities.

But, it is said, that the duties of the executive are distinctly marked out in the constitution, and that no powers devolve on him, but those specifically enumerated, in the second and third sections of the second article. If so, I ask, from whence does the president derive his right to remove from office? A right of late not unfrequently exercised. The counsel for the prosecution, I am confident, are not disposed to question the exercise of this very important function; but, I will thank them to show, where it is included under any presidential powers, which are specially defined in the constitution. They cannot. It is a right springing only from the general grant of *executive power*—a power, which remains in all other cases equally unimpaired; unless when controuled in its exercise, by the qualifications contained in the second and third sections. This is not a novel doctrine. It was the doctrine of the first congress, as the debates of that day will

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manifest; and, I am greatly misinformed, if the present secretary of state, one of the most distinguished members of that honourable body, did not take a decided part in advocating the same principles of construction, which I support at present. Sure I am, they are the only rational and sound ones, that can be used, in giving a just interpretation to the constitution.

The constitution provides, "that congress shall have the power to declare war," and until they do declare it, cry our opponents, the nation is at peace! I shall offer at present, a very few remarks, in reply to this assertion.

War is either offensive or defensive. This distinction is used, only for the purpose of distinguishing the nation, which offends, or which commences the war, from that which defends itself against the attack. The war is offensive by the party which commences it; on the opposite side, it is defensive. The rights of both nations, as to the extent and nature of hostilities are equal. The defending nation is not confined in her resistance, to the mere point of attack. She can at once remove the seat of war, from her own territories, to the dominions of her enemy, and in prosecuting her defence, injure the aggressive power by direct and absolute attacks. May not therefore a defensive war exist, and all its rights attach, without a formal declaration by congress? If not, a singular paradox has grown out of the constitution. Between two nations, there may exist a state of complete war on the one side, and of peace, or at least, a species of qualified war, on the other.

Our constitution, which it has been said, and with justice, was the work of the wisest men, and most enlightened patriots of the nation, cannot be charged with a doctrine so inimical to our safety and our honour. It is a doctrine originating in this prosecution, and as novel as many others by which it is distinguished. The plain and obvious meaning of the constitution, is, that it is the province of congress, when the nation *is at peace*, to translate it into a *state of war*. When an option exists, the *choice* is with them. But, when a foreign power attacks and makes war on the United States, they are then, by the *very fact*, already at war, and any declaration by congress, would be idle and nugatory.

I conclude by insisting, that a congressional declaration of war is not the sole evidence of war, *actually* existing between Spain and the United States. The official communications of the president, made to congress, ought to be received, as evidence of the facts, which they contain, and from them the jury have a right to decide, whether Spain and the United States were at peace at the time of the offence charged in the indictment.

Emmet. I did not indend to trouble the court on this question; but to reserve my exertions, and whatever talents and arguments I may possess, until I shall have the honour of addressing the jury on all the matters connected with my client's defence. I am in-

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mood, however, by the solicitations of my friends near me to alter a resolution, which was not suggested by indolence, but by attentive observation of the whole course of this prosecution; and not to abandon the last effort, which it will probably be necessary to make, exclusively with the court, for bringing forward the defendant's case to the best advantage.

Our object is to give evidence as to the state of the country, with respect to its relation with Spain; for that purpose we offer the president's message to congress, and the other documents to which it refers, and with which it was originally accompanied. It is the president's duty, under the 3d section of the 2d article of the constitution, to lay before the congress information of the state of the union, and of course, of our relations with foreign powers. This message was delivered in performance of that duty; and is therefore, at least, *prima facie* evidence of the facts which it contains. If it and the other accompanying public documents shall be rejected as inadmissible evidence, I confess I do not know where the defendant is to look for any better testimony as to this part of his defence.

But it is stated that the decision of the court, on the motion for putting off the trial, has precluded us from giving evidence as to this point. If so, I think, with the utmost deference, that the court travelled out of the subject-matter before it. I pay profound and willing respect to its decisions, when they relate to the matters submitted to it by the parties; but when they pronounce without necessity upon irrelevant topics, they become extrajudicial, and cannot lay claim to the same authority. Did the court say we were precluded from examining the question whether this country and Spain were at peace? That was never presented to it as the question for its consideration. Our application for putting off the trial was grounded on the absence of witnesses, who could prove, not the state of peace or war, but the president's knowledge and approbation of the defendant's conduct. Why should we be precluded from examining the question whether this country and Spain are at peace? In the indictment it is averred that Spain was at peace with the United States. It is therefore a fact comprehended in the general issue joined in this prosecution; and we are surely entitled, under all the rules of law, to show that it is false. I request the attention of the court to this point. The adverse counsel admit they are bound to prove the fact; but they refuse to us the privilege of disproving it, of counteracting their proofs, and of showing that they are mistaken. Was there, or not, war *de facto*, is emphatically a question of fact, and as such ought to be submitted to the jury: if they should be of opinion that there was such war, the whole of the indictment is not proved. It seems, however, to be argued, that a war *de facto* is not sufficient to disprove the indictment, because it is founded on a statute which is declaratory of the law of nations; and that the

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words of the statute are to be construed with reference to that law. It would be a sufficient answer to that argument to say, that a war *de facto* is recognised by the law of nations; but further, I beg leave to dissent from the opinion that this statute is declaratory of that law, although the assertion has proceeded from an authority which I highly respect. By looking at the statute, it will be found to have been originally enacted for only two years; the limitation of its duration shows that it was not intended to be declaratory of the law of nations; for that law is perpetual, and does not require to have its meaning declared every second year. The object of the act is not declaratory, but to create and describe a crime and to annex a penalty to its commission. The argument drawn from that assertion, I think, therefore, fails on every ground, and that we ought to be permitted to give the president's message in evidence of outrages committed by Spain on our frontiers, and her depredations on our commerce; whether they amount to war *de facto* will be matter of consideration for the jury; but we have a right to show, if we can, that the relation of peace was broken by Spain; that she carried on hostilities, violated our territories, and waged war upon our trade. Permit this to be shown, and she will not appear to be a nation at peace with us; nor will the absurdity be maintained, that we were at peace with her, when she was at war with us.

Harison. I presume that if there is any principle in our law, certain and incontrovertible, it is that in all criminal cases the jury are the judges of the law, as well as of the fact. And from this principle it follows, that no question purely of law can arise, connected with the guilt or innocence of the defendant, which is to be considered as exclusively belonging to the court, and not within the cognizance of the jury. For if, as to certain propositions so connected, the court can pronounce that by law either the affirmative or the negative is to be considered as existing, and exclude the evidence relative to that proposition, it will result, as an inevitable consequence, that they can limit and confines the province of the jury within such bounds as they themselves shall deem proper. They can assume the several propositions and controul the verdict according to their pleasure. In the determination of this cause, the question of peace or war is of primary importance; because, to establish the guilt of the defendant, it must appear that the expedition was against a nation with whom the United States was at peace. Such is the express declaration of the statute. It is therefore "a "turning point," to be determined by the jury whether we were at peace with Spain when the offence is supposed to have been committed; and if the jury are to determine it, they must have every species of evidence that is fit to demonstrate the actual situation of affairs between the two countries.

In opening this cause to the jury, the district attorney seems to have been fully convinced of the doctrine for which I am now

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contending. He then informed the jury, that the fourth point which he should establish would be that this country was at peace with Spain, when the offence was committed, which is charged in the indictment.

At this time, however, he insists that this is a mere point of law, about which the court only is to judge; without reflecting that the great maxim I have already noticed would be violated by his doctrine; and without considering, that in relation to this point, legal inferences can only be deduced from facts antecedently appearing. In criminal cases, it cannot be proper for the court to assume the fact, and determine the law. They cannot tell the jury, *this country was at peace. Such is the law;* and you are to determine the guilt or innocence of the defendant upon that supposition. If the court could do this, the power of the jury in criminal cases would indeed be feeble, and very different from what we have supposed.

But, admitting that the question of peace or war may be proper for a jury, we are told that no war can exist without a declaration by congress. Consequently, that no evidence but the act of congress can be received, to demonstrate the existence of a war between this and any other country.

The federal constitution has, indeed, provided that "the congress shall have power to declare war;" and thence it is inferred that war cannot exist without such declaration. But surely, this provision of the constitution can only relate to cases where there is an option to embrace the alternative of peace or war; and it by no means implies that a formal declaration is essential to the existence of actual warfare.

If the enemy commences the attack, we may appeal to arms immediately, and without any ceremony. The state of peace is no longer in being; and from the very instant that the aggression takes place, the two contending powers, by the law of nations, which is founded upon the law of nature, are to be considered as enemies.

Even allowing then, that as to *offensive* war on the part of this country, the doctrine of our opponents would be correct; yet it should be remembered that there is a defensive, as well as an offensive war; and that the state of peace or war between two countries implies reciprocity. Both must be at peace, or both will be at war. So that, if a foreign country should declare war against the United States, or attack their territories, or commit acts of open hostility and aggression, this country would be in a state of actual warfare, without a declaration of congress upon the subject.

If any doubt could be entertained whether to constitute a war in such cases, it is necessary that there should be a precedent declaration, I could refer the court to the most approved writers upon the law of nations; to Grotius, Puffendorf, Barbeyrac, Vat-

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tel, and others; all of whom (whatever may be the discordance of their opinions as to the necessity of declaring war when it is in its nature offensive) agree in the sentiment that under such circumstances as I have already stated, no rule of the law of nations would be violated, if war should be carried on without being declared.* I might add that the constitution itself has contemplated a case in which war may exist without any declaration of congress; where a state may engage in it, though not invaded, if in such imminent danger as will not admit of delay.

The question, then, as to the state of our peace, must depend upon a variety of circumstances, and may be made evident to the jury by a variety of proofs. In the case of offensive war, the declaration of congress could be resorted to; and where the war commenced by the acts of aggression of the enemy, the acts might be proved in the same manner as every other fact of great notoriety.

If then this country might have been actually at war with Spain, without any declaration of congress, it will only remain to show that the President's message is proper evidence to establish the fact. Here I must observe to the court that, by a particular provison in the constitution of the United States, it is made the duty of the president, to give congress information, "from time "to time, of the state of the union." Hence, his official communications to the legislature, must be considered as stamped with the character of truth, and carrying in themselves the most irrefragable evidence of those facts which they relate. The state of the union depends, not only upon its internal circumstances but also upon its situation with respect to foreign powers; and when the chief magistrate of the union exhibits to the congress a state of facts, there can be no higher evidence to establish their existence, and the consequences that result from them.

The court will no doubt recognize the presumption of law, that all magistrates execute their duty with fidelity; and this presumption shall prevail until the contrary is shown. But if such a presumption exists as to the ministers of justice and subordinate magistrates of the country, it must apply, with much more force, to him who is invested with the highest dignity, and most important trust. It would be indelicate to suppose that he had deviated from the truth, and it would require the most convincing proofs to establish the fact.

We hope, therefore, that the president's message will be admitted in evidence for the consideration of the jury; and we trust

* Vide Bynk. Quest. publ. Jur. lib. 1. cap. 2. Vattel, lib. 3. cap. 6. sect. 57. Grot. de Jur. B. et P. lib. 3. cap. sect. 6. Pufi. de Jur. Nat. and Gent. lib. 8. ch. 6, and the notes of Barbeyrac. Heineccius Systema Juris, b. 2. ch. 9. sect. 197 and Hen. Cocceii et Sam. L. B. Cocceii, Com. ad Grotium. Vide etiam Nolfii Jus Gentium, cap. 6. sect. 713.

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it will convince them that the United States were not at peace with Spain, as is alleged in the indictment.

One objection, however, still remains to be noticed. It is said the present questions have been determined by the decision of the court, upon our application to compel the attendance of witnesses. But I do not think this is the case. If I am not mistaken, the court mentioned that if the United States were not at peace with Spain, the defendant could not be guilty; and that the affidavits produced by the defendant, did neither allege the existence of a war on the part of the United States, or that the witnesses could prove it. As far as the language of the court then went, according to this statement, it seems to imply that the question of peace or war was open for discussion; but as we did not allege the materiality of the witnesses to prove the state of warfare, the court could not defer the trial on account of their absence. We were certainly under no necessity at that period of the cause to allege the state of warfare, for any other purpose but to obtain the attendance of those witnesses. If we did not judge it proper to make the allegation for that purpose, still we have a right upon the trial, to avail ourselves of the defence, and if permitted to do so, it will be a complete justification.

Sanford. I shall be extremely brief in reply to the arguments of the gentlemen who have dilated so much upon the point now before the court.

The authority cited to show that the gazette is proper evidence to go to a jury, is inapplicable until a previous question shall have been decided. The question immediately before the court, and which I apprehend must be first decided, is whether the defendant can be allowed to offer any evidence whatever *to the jury*, to show that the United States were at war with Spain. If it shall be decided, that the defendant is entitled to give evidence to the jury, to show a state of actual war, an ulterior question may then arise, whether the gazette, or whatever else may be offered is proper evidence for that purpose. I shall, therefore, entirely abstain from a discussion of the latter question, and shall return to our former proposition on this subject, which is, that the question of peace or war under this statute, is a question of law to be decided by the court, and not a question of fact to be decided by the jury. If then, this be the point which is now presented to the court, I conceive that it has already been very fully discussed, and has already received the decision of this court. The adverse counsel are pleased to say, that they did not understand that this point was before decided. They surely have not so soon forgotten that this very argument was discussed upon the argument of the motion for a postponement, and for attachments. Did they not there urge, that the testimony of their absent witnesses was wanted for the purpose of establishing a state of actual war? And was not their whole train of reasoning upon this subject,

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the same that has now been urged? The opinion of the two judges, as I understood it, was, if not in terms, at least by necessary consequence, that the question of war or peace under this statute, is a question of law exclusively for the decision of the court.

[Here he recited some parts of the opinion, for which vide ante pages.]

This opinion, however, is not now before the court, and I can only cite it from memory. I will, therefore, rapidly recapitulate the reasons upon which we contend that the question of war or peace is in this case exclusively a question of law.

The high power of making war, is vested by the constitution, in the legislature alone. This provision of our constitution, is evidently the result of that jealous spirit of liberty, which pervades the people of this country. The power of making war, so important to their interests, and if abused, so dangerous to their liberties, could not, consistently with that spirit, be vested elsewhere than in the whole legislature.

It follows, that under our constitution, the only evidence of a state of war which can be recognised by the courts, is the act of the legislature declaring it; for until the legislature has declared war, the nation is constitutionally and legally at peace. This consequence seems plain and undeniable. But the adverse counsel say, that war may exist in fact, though not declared by congress; that war may exist by the actual commission of hostilities, or may take place by the actual invasion of our country. They then ask, is not this war? And may not individuals, in such a state of things, undertake military enterprises against the offending nation without incurring the penalties of this statute? I answer, certainly not. I concede that the state of things which exists when the country is invaded, or actual hostilities take place, may in a certain sense of the term, be denominated war, and the counsel opposed to us, concede that war may exist by the declaration of congress, though no invasion or hostilities should have taken place. We find then, that we are here using the words war and peace in different senses. Our opponents talk of actual war, and we speak of war declared by congress. The question between us then, comes to this inquiry; in which of these senses have the legislature used the word war, or its correlative peace in this statute?

Without urging other topics in support of our construction, a very slight attention to the consequences of the opposite doctrine, will be sufficient to show that the word peace is used to indicate that state of things which exists when the nation has not declared war. Actual hostilities may take place by the irregularities or violence of individuals, or if the counsel please, the United States may be invaded, and yet the legislature may suppose that the best interests of the country require it not to de-

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clare war, but to attempt to obtain redress by negotiation. It cannot be denied that they are the constitutional judges of this question. If they have the constitutional right of deciding whether the nation shall make war or not, it follows that all the individuals of the community must submit to their decision. But the doctrine set up on the other side, is the very reverse of this. It is now contended, that if actual hostilities have happened in any extent whatever, all the people of the community are absolved from their obligation to remain at peace, and may set on foot military expeditions, and make any sort of offensive war, though the government of the country should not have declared war, and should wish to remain at peace. According to this doctrine, any individual may, at any time, declare, that in his judgment, war has taken place, because some act of irregularity or violence has happened, and may take steps, the certain tendency of which, will be to precipitate the nation into a serious conflict. When Great Britain shall capture our vessels, or impress our seamen, or commit any other act of violence, which by itself may be denominated war, it is then the right of every citizen, according to this doctrine, to fit out an armament to invade the territories of Great-Britain, and make war upon her subjects.—When disputes are subsisting between the United States and Spain respecting territorial bounds and Spanish troops occupy a part of the disputed territory, claiming it as their own, this is called an invasion of our territory, and is denominated war; and Colonel Smith, and every other citizen of the United States, is therefore at liberty to undertake hostile enterprises against the dominions and people of Spain, though the government of the country, with a full knowledge of all the circumstances, has decided that it will still remain at peace.

These are the consequences of the doctrine now urged on the other side, and however absurd are not exaggerated. It never can be seriously imagined, that the legislature used words in a sense which must lead to such absurd consequences. The plain and obvious meaning of this statute is, that while the government of the country are at peace, all the citizens should be bound to observe the duties of that situation, and the very object of the statute is to prevent individuals from plunging the nation into war, by their own unauthorised acts of violence. The peace, mentioned in the fifth section, is described to be peace between the United States, and the foreign *prince* or *state*, thereby indicating that state of things which exists while the nations, and their governments are at peace. Any other construction would lead to the solecism, so well described by the presiding judge of this court, who is now absent, in his late charge to the grand jury, of a nation at peace, and its citizens at war.

But the adverse counsel still ask, have not our citizens a right to defend themselves when the country is invaded? Certainly

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they may, but this does not in any degree prove, that they have a right, in such circumstances, to invade a foreign country in turn. Defensive war is a branch of the natural right of self defence, which is enjoyed by communities and individuals in all circumstances whatever. The right of making offensive war, belongs solely to the sovereign power of the community, and can only be lawfully exercised by its authority. The rights of defensive warfare are not in question in this case, but the inquiry is, in what circumstances the citizens of this country, may invade the territories of another. Our position is, that according to the constitution of the United States, and the true meaning of this statute, no citizen can set on foot military expeditions, or make war against the dominions of a foreign state, until the relations of peace shall have been dissolved by an act of congress.

In this case, no law has passed declaring war, or authorising hostilities against Spain. Our treaty with Spain is still in force, and is therefore the supreme law of the land. It results that in these circumstances, the court is judicially bound to consider the two nations at peace, and that the proposed inquiry is improper.*

Hoffman. The counsel for the prosecution have the right of closing this argument; but, as the decision of the present question involves very important principles, and is intimately connected with the defence of my client, I ask permission to follow my learned opponent (Mr. Edwards) who has just spoken. I am greatly mistaken if I shall not refute his reasoning, and establish our own arguments, by the very authorities which he has produced. It has been asked, with a degree of triumph, if a private citizen can capture the property of an enemy, or commit depredations on his commerce, without regular commission or authority. Now it so happens, that we have never contended for a principle so illegal, nor evinced such ignorance of the law of nations. The question and answer were equally the offspring of the counsel's own fertile imagination; and could only have been introduced to divert the attention of the court from the true point in discussion, or to afford himself an opportunity of displaying his ingenuity in refuting arguments which we should have been ashamed to advance. We fully admit, that an individual acting *offensively* against a common enemy, must be regularly authorised by his own government, otherwise his aggressions might be deemed piratical, and himself rendered liable to punishment, as well by the foreign nation as by our own tribunals.

The court surely understands that Col. Smith is not charged with an offence of this nature; that the indictment is founded on

* The reporter regrets that he cannot give the argument of Mr. Edwards which preceded that of Mr. Hoffman. The transcript of his speech was left with him for revision, and the reporter has not since obtained it, though the press has been delayed for that purpose for several days.

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a particular statute; and that to bring him within its penalty, Spain must have been *at peace with the United States*. But we offer to prove her at war, and the sole question is on the admissibility of the evidence, necessary to establish that fact. Our opponents contend, that a declaration of war by congresss is the only legal evidence of the fact. This we deny. And it must be granted, if we are right, that the evidence we offer is of the highest nature, and must be received. I certainly feel much indebted to the learned counsel for his research into the laws of the United States; and thank him for their production, which occurs so opportunely for the support of my argument. They were not within my recollection, or I should have read them, as furnishing a practical construction of the constitution. They have been rightly considered as a legislative interpretation of that instrument. Before I advert to these acts, I will notice the 12th article of the amendments to the constitution, which says, "The powers not "delegated to the United States, by the constitution, nor prohi- "bited to it by the states, are reserved to the states respectively, "or to the people."

This amendment was pressed into the argument with all the zeal of sincerity; yet I am at a loss to comprehend its connexion with the present discussion? We are agitating, whether the United States were at war, or in peace? The right to determine on the one or preserve the other, is *expressly* delegated to the United States: neither the states respectively, nor the people at large, can exercise any constitutional power over this question; its decision exclusively belongs to the general government; and the present inquiry is, to which department thereof does it belong?

Further—The object of this amendment, was to prevent the United States (not particular departments of its government) from assuming the exercise of powers by implication; tending to infringe the sovereignty of the states, or to violate the rights of the people. The nature of our federal government, excited a vigilant and cautious jealousy on this subject; and the amendment was made to insure the jurisdiction, and local sovereignty of the states over all matters, not peculiarly of national interest or concern. A chapter of the alcoran would have elucidated the gentleman's argument as clearly as the amendment.

Let us see whether he has been more fortunate in his reliance on acts of congress. The first quoted is the act of the 27th of March, 1794, entitled "An act to provide a naval armament." It recites that "the depredations which had been committed by "the Algerine corsairs on the commerce of the United States, "rendered it necessary that a naval force should be provided for "its protection;" and it authorises "the president to provide six "frigates," and makes the necessary provision for officering and manning them. This act provides the ways and means for a naval force, but contains no direction for its employment or destina-

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tion. The framers of the law knew the full extent of their constitutional powers. They knew, that it was the duty of congress to provide the *ways and means* for carrying on war, but that it belonged to the executive of the union *to direct the public force.*— The last section, is important, as it plainly indicates, we were *then* at war with Algiers: "If a *peace* shall take place between "the United States and the regency of Algiers, no farther pro- "ceedings are to be had under the act." What! were we then at war with Algiers, and without any declaration of war by congress? Yes; and congress, without whose declaration, the gentleman would have us believe, that the United States must always enjoy the tranquillity of peace, do not, by this or any prior act, declare war against Algiers; they find it already commenced without their concurrence. The choice of decreeing the fact is superseded by the fact itself. They increase our naval forces, and forbid their reduction "*until peace shall take place.*"

Again—I ask how congress became informed, that Algiers was at war with us? They are not charged by the constitution with the intercourse between us and foreign powers, for that is an executive function. I apprehend a little more research would have produced a message from the president, wherein he judges of the fact himself, and recommends a more effective force to be provided. What is this, but his declaring the situation or state of the nation, as it respects Algiers? To comment on each of the laws cited by the counsel, would be an unpardonable waste of time; I shall only notice some of them, and that in a very cursory manner.

The next in order is an act passed 20th April, 1790, and being merely supplementary to the law first read, cannot invite a single additional observation. We have next "an act for providing a naval armament," passed 1st July, 1797, which makes provision for the officering and manning of two frigates.

I remark, that the act of March 1794, was no longer in force, peace having taken place with Algiers; and the statute of 1796, provided for the *building* of frigates, but not for their equipment, or the subsistence of their officers and crew. It would lengthen out my reply unprofitably to mention, even by name, the numerous statutes which have been read. They are generally of the same import—one authorises the president to build or purchase twelve ships—another adds some revenue cutters—a third allows our merchantmen to protect themselves, and, by a fourth our intercourse with France is prohibited. Why they have indiscriminately been forced into this day's service, I am at a loss to comprehend; nor have I been able to learn, from the arguments of the counsel, the application of any, excepting the first and the last, to the present question. These I gladly present to the consideration of the court; they bear strongly on the present question; and, in my judgment, place our doctrine beyond a doubt. Before I con-

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sider them, I repeat one general observation, "*that war can exist* "*between the United States and a foreign power, without a decla-* "*ration of war by congress.*"

Now for the acts: the first is the act of 28th May, 1798, entitled "an act authorising the president to raise a provisional ar- "my." This act called forth many strong remarks from the gentleman; and from his language, I am to conclude that he spoke the genuine convictions of his judgment; his inferences and my own, from the same source, are very different, and the court will decide between us. This law declares, "that the pre- "sident of the United States be, and he hereby is authorised, *in* "*the event of a declaration of war against the United States*, or of "actual invasion of their territory, by a foreign power; or of im- "minent danger of such invasion, discovered in his opinion to "exist; before the next session of congress, to cause to be enlist- "ed and to call into actual service a number of troops," &c. &c.

Do not congress here, by express terms, contemplate the fact of the United States being at war, by the *sole act* of a foreign power? An army is to be raised and to be called into actual service, not in consequence of a declaration of war by congress, but in the event of war declared *against* the United States. And let it always be remembered, that the nature and the place of this actual service are left to the judgment of him, in whom the constitution has wisely confided the direction of the national forces.

It must be admitted, that this act is no declaration of war; it is prescriptive, and it supposes a war may prevail between the United States and a foreign power, before the next session of congress.—Prevail—how? The reply is obvious; congress would be out of session. The war could not proceed from their act; yet it might take place by a declaration of war *against* the United States, and in that case, congress considers us, in every sense of the term, *a nation at war*. Our nation would be stamped with the character of belligerent, and its warlike operations would assume an offensive or defensive course, as circumstances might demand. This act is wholly inconsistent with the assertion, that the nation must always be at peace, until congress shall declare it at war.

I come now to the last act, passed 2d March, 1799, entitled "an act giving eventual authority to the president to augment the army." This act differs from the preceding one, as far as I can at this moment discover, only in its phraseology. Instead of providing for a case where war shall be declared *against* the United States, Congress, knowing that a foreign nation might make war, without any formal declaration to that effect, vary the terms before used, and provide "in case war *shall* BREAK OUT *between* "*the United States and a foreign European power*" for the augmentation of the army. The inference is too plain and too strong to be resisted. Can the court believe, that congress ever indul-

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ged so illusive an opinion, as that war or peace depended on their will or pleasure? "*If war breaks out*," (says the act) not by the choice of the United States, for then we admit that congress alone has the election, but, *breaks out*, by the acts of a foreign power, over whose decision and conduct congress could have no controul. The case here contemplated is altogether analogous with that, which we hope to prove existed at the time of the offence, charged in the indictment; for we offer expressly to show, that war had *broke out* between Spain and the United States; by Spain having, without any formal declaration, actually made war on the United States. If our testimony does not establish this fact, it cannot serve us.

Unfortunately for the gentleman, his inferences from the last statute, and the principle, for which he has so warmly contended, are directly at variance. "Congress *alone*," says he, have the only "power of declaring the nation at war." If this power is conferred exclusively on them, they cannot delegate it to any other branch of the government; for each department must execute its prescribed constitutional trust. We might as well say congress could devolve the whole duty of legislation on the president. I demand then, who was to judge the fact, whether or no, in the language of the last statute, "*war breaks out?*" The president. And his opinion would fix our nation exactly in the condition, where it is pretended congress alone could place it. What is this, but admitting the right of the president to pronounce, in the given case, the *condition of the nation*, by declaring that war did exist.

Our reasoning is perfectly consistent; there is no incongruity in the exercise of the power, which we ascribe to the executive, and of the right vested in congress. When the United States are at peace, congress alone can elect to go to war; they cannot commit this choice to the president; but when war shall break out, or in other words, when a foreign power shall declare or make war against the United States, it is with the president to declare the fact, and with congress to provide the ways and means for defence.

I have thus endeavoured to confine my remarks strictly within the limits of reply. This argument was unexpected; but, feeble as it has been on my part, I cannot but hope it will prove satisfactory. I repeat my sense of obligations to the counsel, for the strength his better acquaintance with our statute laws, has afforded to our general proposition; for, if legislative sense and practice on an article of the constitution, can be deduced in aid of its true interpretation, we feel, that we stand upon sure and strong grounds.

I conclude with entreating the court always to distinguish, that we are not indicted for any offence against the law of nations; but charged with infracting a particular statute, of which there could be no breach, if Spain was at war with us. The pub-

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lic prosecutor has so shaped his indictment, and by it he must abide.

The argument on this point being closed, the judge, in a few words, decided that neither the president's message, or any of the documents that were offered, should be read.*

Colden. We now offer testimony to show that the government had knowledge of the whole transaction.

TALMADGE, J. That has been decided as not being material to the issue. That question was deliberately settled in a full bench. I cannot attempt to alter it myself.

Colden. We do not ask to prove it by the gentlemen who are at Washington. We offer Mr. King as a witness, who is now here, to prove that the expedition was made with the knowledge and approbation of government.

TALMADGE, J. It cannot be received, as it is wholly immaterial.

Colden was then proceeding to address the jury—when the district attorney informed him that he should offer further testimony—and thereupon called again,

John Fink.

He produced a paper, partly in the hand-writing of colonel Smith, that is to say, the caption was written by col. Smith, but there was written upon it "muster roll for president's guard;" but these words were not in the hand-writing of col. Smith. This was the roll which accompanied the money amounting to 300 dollars.

Morton. Did you give col. Smith a receipt for that sum? A. I think I did; but if I did not the receipt was drawn up.

Another paper in col. Smith's hand-writing was produced; it contained a statement of the terms on which the men were to go abroad.

Q. Who was to be sergeant of this corps? A. John Burke; and this is his hand-writing.

Hoffman. I object to this testimony.

Sanford. It is proper—we can prove the hand-writing.

TALMADGE, J. It is offered, I presume, to show a military expedition was set on foot.

Hoffman. I never heard such testimony but what was objected to.

Colden. Whenever you give the acts of an agent in evidence, you must show the connection between the agent and principal, and you must show that he acted within the authority given to him.

* The reporter regrets that the expressions of Judge *Talmadge* escaped him. But his honour did not enter into any argument or reasoning on the subject, but merely decided that the testimony offered by the defendant could not be received.

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Edwards. We have a multiplicity of evidence to show that they were connected.

TALMADGE, J. We have heretofore suffered testimony to show the fact of an expedition; but that was to show that this was a military expedition. The mere enlistment of men, unless the party was connected with Col. Smith, and that for military purposes, is of no importance.

Benjamin R. Robson sworn.

Q. Are you a physician? A. Yes. Col. Smith asked me to go on a secret expedition. The application was made about January. The destination was a very great secret; but I was to have an interview with the commander in chief. I next saw Mr. Douglass; he asked me if I had seen Mr. Scofield, and told me that he wanted to see me. When I saw him he told me he was going also. When I saw Col. Smith again, he wanted me to go as surgeon. The first time, it was proposed to me to go as surgeon's mate.

Q. What did you understand by the words secret expedition? *A.* I understood the expedition of the Leander.

Q. When did you see colonel Smith? *A.* Some time in January I was introduced to him, and he informed me he had my name. I asked him if it was an honourable affair, compatible with my allegiance to my country, as I would not engage if there was any risk on those points: he told me he had the approbation of Mr. Jefferson and the secretary of state, I did not understand that the expedition was intended against any foreign country. I saw him afterwards, and asked him again what was the object; he told me it was an honourable action, and not against either England or France; that the people where we were going, were prepared to receive us with open arms. He assured me I should have the surgency of a regiment. I understood him that I should be employed in the military land service, and the same of Mr. Cutting. I asked him what security we had for our future support; he told me that if the expedition succeeded, I should have my situation for life, but if it did not succeed we were to do as well as we could: this determined me against going. He wanted me to procure a case of surgeon's instruments; I asked how they were to be paid for. He told me if we succeeded they would be paid for by the concerned, and I might keep them.

Colden. If the court please, I find by some gentlemen around me, that it has been understood that I only offered to read the president's message to congress, at the opening of the session; I pray that it may be noticed, that I offered to read a variety of documents, which were communicated by the president to congress, at the commencement of the sessions. Such as governor Wil-

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liams' official account of the capture of the Kempers, also his letter, stating the capture of Flanagan by a party of Spanish light-horse. Communications from Mr. Gavino, our consul at Gibraltar; certain protests made at Cuba; and captain Stinson's account of the capture of the ship Huntress. These, with a variety of other documents of the same nature,* I had then in my hand, and should have read with permission of the court; and should the court think them, or any of them admissible, I will now read them.

TALMADGE, J. It is not necessary.

Charles S. Cutting sworn.

Q. Was application made to you to go on this expedition? *A.* There was not a direct application, it was spoken of to me by Mr. Robson, and then I went to Dr. Douglass, who gave me a line to colonel Smith, and I went to him afterwards; first time I went, colonel Smith did not appear, I called again, and had an interview with him; he promised me a military situation; I was to be a lieutenant, coupled with the adjutancy; it was for the land service, but the nature of it was not explained to me, and I agreed to go, but afterwards I declined, having no certainty or security for my pay, or in case of being taken prisoner of war, I did not know what country to look to for protection.

Q. What time was this? *A.* It was last January; two or three weeks before the Leander sailed. I asked colonel Smith to explain to me the nature of the expedition, but he declined.

Colden. Did you understand it was to go in the Leander? *A.* Yes, I understood it was to go in the Leander.

Q. Did you understand that you were to go as a passenger, and take your military situation when you arrived at the port of destination? *A.* I understood the commissions were to be on board, and I expected to receive mine at Sandy-hook.

Hoffman. Did you understand that you were to have an opportunity to return if you chose to decline the expedition? *A.* We had no security for that option, but I believe a general promise was given to all who went.

Adam Ten Brook sworn.

Q. Were you enlisted to go on this expedition last winter? *A.* Fink engaged me to go to Washington to be a horseman, to follow the president as one of his military guard.

Q. Who told you this? *A.* Fink: he told me I was to be one of the president's guard.

Q. Did you go to Washington? *A.* No.

(* See Appendix.)

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Q. Why did you not go? *A.* Because I thought there was some trepanning in it; I was twice on board the Leander, but did not go with her.

Hoffman. Did you sign that paper? (showing him Fink's list) *A.* No; Burke wrote my name.

Hoffman. Did you receive the money? *A.* Yes.

Hoffman. By this paper you promised to return it, have you returned it? *A.* No, I did not; I kept it.

John Ripley sworn.

Q. Do you know colonel Smith? *A.* Yes; colonel Smith mentioned to me that an expedition was fitting out in this country, and he asked me if I would accept a commission. I do not recollect the time when this conversation took place, nor the particular circumstances, but the amount of my impressions is, that it was an expedition against the Caraccas, under the patronage of the British government; that general Miranda was to command it; that he had laid it before the heads of departments; Mr. Madison's name was mentioned; that a ship was in port, going to take in troops, arms and ammunition; that colonel Smith said he could not go himself without the consent of government, as he held an office under it; that application had been made for his leave of absence, but it was refused him; but it was said that he could travel if he chose, and no application was necessary. He asked me if I would accept the command of a regiment.

Q. Was the Leander in port at the time of this conversation? *A.* I believe she was, but colonel Smith did not mention the name of the ship; he stated that an expedition was on foot, and that general Miranda was to command it; that the object was to emancipate the colonies from the government of Spain; that it had the approbation of the president of the United States.

Q. What did you understand by colonel Smith's asking leave for absence? *A.* Leave of absence from his office for a time, without resigning it.

Henry Mack sworn.

Q. Did colonel Smith apply to you to go into the military service as an artillery-man, and what were the terms of that application? *A.* He asked me if I would go into our service as an artillery-man; by our service, I understood the service of the United States, but finding it was not for our service, I declined to go; he promised me the place of 2d lieutenant; he gave me an order for uniform upon Weyman in Maiden-lane. I gave up the design the next day, and went to colonel Smith and informed him of it.

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Colden. How came you to go to col. Smith? *A.* I was sent by capt. M'Lane, in whose employ I was. I do not recollect the time when this happened.

Godfrey Crawbuck sworn.

Q. Were you enlisted or engaged to go into the military service last winter? *A.* I was enlisted by Fink to go to Washington, and from thence I was to go to guard the mail to New-Orleans; I was to go on horseback, as one to constitute a guard for that purpose.

Thomas Lee sworn.

Q. Were you enlisted last winter for the military service?

A. Yes.

Q. Who by? *A.* By Fink.

Q. What were you to do? *A.* Why I was to go to Washington in some horse service; they talked of sending me for a trumpeter.

James Owen sworn.

Q. Were you enlisted last winter for the military service? *A.* I was enlisted by Fink.

Q. Well, what were you to do? *A.* Why, I was to go to Washington to guard the president on horseback.

Hoffman. Did you sign this paper? (showing Fink's list) *A.* Yes.

Q. Mr. Gelston, did you make application to colonel Smith about this expedition—and did he return you an answer in writing? *A.* Yes; the date of my letter is of the 13th February, and his answer is dated the 18th following. The application was for a list of the goods, &c. which had been entered on board of the Leander, on her last voyage. His answer is official, and dated from the surveyor's-office.

Richard Platt, junior, sworn.

Q. Were you enlisted in the military service last winter? *A.* Yes; I was to go as a corporal in the government service. Fink told me that I was to go from here to Washington, to guard the president; that he was going to travel, and wanted a guard. I went down to colonel Smith, one of the first, and some others of the young fellows went too, to know where we were going? He answered us he could not inform us; but he told us we were not going out of the states. He mentioned that he could have a large sum if he was to disclose the object to a particular man; that his son would always be with us, and we should serve in no other corps.

Colden. Did he say he was bound to keep it a secret? *A.* No.

Q. Are you certain that he told you you were not to go out of

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America? *A.* I think he said that we were not to go out of the states, but I will not swear positively; it was either states or America.

Sanford. Are you positive that colonel Smith said you was going into the service of government? *A.* It was Fink told me so, not colonel Smith.

Colden. Did he say United States or America? *A.* He said *states*, and assigned this reason, that colonel Smith's son would be always with us.

Q. Mr. Gelston, did the Leander sail under a sea letter? *A.* No; she sailed as a foreign vessel.

Colden. May it please the court. Gentlemen of the jury, however accustomed an advocate may be to appearing at the bar, he cannot rise to address you in a cause like this, without feeling the weight of the task that is before him, and embarrassment from just apprehensions that he may not discharge it with credit to himself, or justice to his client.

For my own part, however, I find consolation in the reflection that the duty assigned to me, is only the humble one of opening to you the defence which will be insisted upon, and in the consideration that I am to be followed by the learned, and able counsellors, with whom I have the honour to be associated.

Before I proceed to a particular consideration of the charges in the indictment which is now before you, suffer me to detain you a few moments by some preliminary remarks.

This, gentlemen, is avowedly a state prosecution; and the defendant you are now to try, is brought before you as a criminal, in consequence of a special order of the president of the United States. This circumstance, of itself, ought to awaken your most watchful and jealous attention, and should you discover that a measure, so much out of the common course of criminal proceedings has been dictated by any other motives than a due regard to the administration of justice; should you find that the officers of the executive government, who have instigated this prosecution, have an interest in the conviction of the accused, you will doubtless deliberate with the utmost caution, before you pronounce a verdict of guilty. Let me add, also, that this is not only a state prosecution, but is one about which the officers of state have shown an earnest solicitude. For, gentlemen, you see it has not been thought proper to confide in the official prosecutor, though his abilities are equal to this, or any other case; but it has been thought proper to enlist against the defendant, the talents of the honourable judge, who now appears at your bar. By the humane provisions of our laws, the judge on the bench is to be of counsel for the accused; we trust he will be so; but in the judge at the bar, you must only see the learned lawyer, the ingenious, and eloquent advocate, and I must add, (on this occasion) the zealous prosecutor. It cannot be improper,

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or indecorous, that I should call your attention to this extraordinary circumstance, and caution you against listening to day to the honourable judge, who is our opponent, with the same deference, and respect, which it might be your duty to pay to what he might say in his more dignified and venerable capacity to-morrow.

You have already learned that the defendant, by the indictment which you are now trying, is charged with participating in an enterprise, said to have been lately undertaken by general Miranda, for the liberation of his native country, the Spanish provinces in South America; and this enterprise, Mr. Attorney has allowed himself to call dangerous and audacious.

Dangerous enough, no doubt, gentlemen! There are but few men, who would dare to encounter its perils. But how is it audacious? You have heard enough of Miranda and his views, to judge how well his enterprise deserves terms of reproach. His countrymen groan under a triple tyranny, they are oppressed by a colonial government that itself trembles under the despotism of the mother country, whose king and people are again subjugated by that power which has subjugated almost the whole continental Europe, and rendered its princes vassals, and its people slaves; whose mighty influence, there is too much reason to fear, reaches across the Atlantic, and is felt even at this moment, and in this place. Miranda's countrymen have long looked to him as their deliverer. He has undertaken the emancipation of millions of men, to plant the standard of liberty on his own native soil, to extend to the richest natural, and poorest artificial country on earth, that freedom which would allow it the enjoyment of the blessings of nature; and shall we, who have just burst the bondage of infinitely less galling chains, call this an audacious enterprise? No gentlemen, an American ought not to reproach Miranda, and under other circumstances, the government or its officers would not have done it. Had things turned out differently; had our affairs with Spain taken the course that was expected when Miranda was at Washington, this would have been called a glorious and generous enterprise, and the executive officers of our country, would have challenged the approbation and applause of the world for having given it their sanction and encouragement.

You have been told by the district attorney that your verdict against the defendant is requisite to do justice to the foreign government, that has taken offence at the expedition of Miranda; we have indeed had reason to suspect, that there was more intended by these prosecutions, than merely a vindication of our laws, but we did not expect to hear our suspicions confirmed by such an avowal. You are not then it seems, merely to consider the guilt or innocence of the accused, but you are to look to what a foreign government requires of you; and have we already arrived at this point that the influence of a foreign govern-

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ment shall be felt in our tribunals? But though Spain or France may require the sacrifice of this individual, and threaten us with their vengeance unless it be made; however willing our government may be to offer up the victim, I trust in God that they will find that they in vain seek in a court of justice an altar, or in jurors the sacrificers.

The defendant, gentlemen, is your countryman; your fellow-citizen; a veteran of the revolution; he was the companion, friend and fellow-soldier of Washington, and is the son of Adams. He is accused of having unauthorisedly and wantonly embarked in an enterprise in disobedience of the laws, and which is likely to involve his country in a war. May I not require you, when you are about to decide on this accusation, to turn your attention to the character of the defendant, to look over his past life, and to ask yourself if it does not afford some presumption, that such a crime cannot belong to him. Before I proceed to examine the testimony, I think it will be proper in a case circumstanced as this is to submit to you some observations on your province, and your rights, and duties as jurors.

In every criminal case, gentlemen, you are the judges, both of the law, and of the fact. You are sworn to determine according to evidence, that is, according to the evidence that you may have of the law, as well as of the fact.

With respect to the law, there is no doubt but that you ought to listen to the opinion of the court, with all that profound respect which is due to it; but you must also listen to us, as well as to the court, or our adversaries; you must hear the authorities we shall read to you, and attend to our reasoning upon them, and as you shall be yourselves convinced, or as you shall believe in your consciences the law is, so must you pronounce your verdict. If the opinion of a judge was to be binding and conclusive on you in a criminal case, where would be the advantages of this boasted trial by jury; how would it be a protection or safeguard against oppression? If the judge may say, and bind you by saying the law condemns, where is the use of calling on you to deliberate on the guilt or innocence of the accused? It would be a solemn mockery to do so, and it would be infinitely better at once, to let the executive hand the accused over to the discretion or mercy of a judge.

As to the evidence of the fact, gentlemen, it arises from the testimony that is offered to you; but not solely from that; you are to be, you ought to be governed by facts, the existence or truth of which are notorious and manifest, or which are within your own knowledge. You are not on the testimony of the witnesses alone, to pronounce a verdict of guilty, when you are confident of the existence of circumstances which justify, or excuse the defendant, and entitle him to acquittal. You will not shut out the light of your own understandings, or reject the evidence of

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your own senses, because our adversaries have been able to interpose certain forms of law or technical rules, which hide the light, or conceal the truth. If you were called to decide as to the truth of the christian religion, I do not know that we should have it in our power to bring before you, legal evidence of the divinity of our Saviour; and if you may not yield to the conviction of your own minds, you would be obliged to pronounce a verdict, contrary to the articles of your faith.

I shall not dwell longer on this point, gentlemen, but content myself with reading to you some passages from a book, whose title at least is inviting. It is called "British Liberties, or the "Free-born Subject's Inheritance." I do not know of what authority it is, nor is it of much consequence, because what I shall read, is chiefly abstracted from the reports of Lord Chief Justice Vaughan, than which no book is of greater credit, and from other authors of equal respectability. He says, "all which ju- "rors must be honest, substantial, impartial men, and being "neighbours of the party accused, or place where the supposed "fact was committed, cannot be supposed to be unacquainted "either with the matters charged, the prisoner's course of life, or "the credit of the evidence; and all these (the jurors) must be "fully satisfied in *their consciences* that he is guilty, and so unani- "mously pronounce him on their oaths, or else he cannot be "condemned; for the office and power of these juries is judicial. "They are the only judges from whose sentence, the indicted "are to expect life or death, upon their integrity and understand- "ing the lives of all that are brought into judgment do ultimately "depend, and from their verdict there lies no appeal; by finding "guilty or not guilty they do completely resolve both law and "fact."

"According to Mr. Care, judges are made by prerogative, "and many times heretofore have been preferred by corrupt "ministers of state, and may be so again in time to come, and "such advanced as would serve a present turn, not always "the most distinguished for integrity and skill in the laws."

"They are (the judges) so few that they may be easier cor- "rupted, they cannot be challenged, and may be apt to think "themselves above any action, and thence be encouraged to "strain a point now and then. The major part of them agreeing "is enough; they are never sworn at each particular trial, but "only once at first, and that in a very general manner; all these "things have formerly happened to bias some judges, and what "may again happen no one knows."

"Now let any man of sense consider whether this method is "not more proper for sifting and discovering the truth; for find- "ing out the guilty and preserving the innocent, than if the "whole decision were left to the examination of a judge, or two

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" or three, whose interest, passion, haste, or multiplicity of bu-
" siness, may easily lead them into error.

" Deservedly, therefore, is this privilege of trial by juries
" ranked among the foremost of our fundamental laws; which,
" whosoever shall attempt openly to suppress, or craftily to un-
" dermine, and *render only a formality*, does, *ipso facto*, attack
" the government; he brings in arbitrary power, and is an ene-
" my and a traitor to his king and country."

" Among other devices to undermine the rights and power of
" juries, and render them insignificant, there has an opinion been
" advanced, that they are only the judges of the fact, and are not
" all to consider the law; so that if a person is indicted for a
" fact, which really is not a crime in itself by law, but is worked
" up by words of form as treasonably, seditiously, &c. if the fact
" is but proved to have been committed, though these wicked
" circumstances do not appear, they shall be supplied by the
" law, which a jury are not to take notice of, but find the bill for
" bringing in the person guilty, and leave the consideration of
" the case in law to the judges, whose business it is."

" Thus some argue: but it is an apparent trap at once to per-
" jure ignorant juries, and render them so far from being of good
" use, only tools of oppression to ruin and murder their inno-
" cent neighbour; for, though it be true that matter of fact is the
" most common and proper object for a jury's determination,
" and matter of law that of the judges; yet, as law arises out of,
" and is complicated with the fact, it cannot but fall under the
" jury's consideration. Littleton (See 368) teaches us that the
" jury may, at their election, either take upon them the know-
" ledge of the law, and determine both the fact and law them-
" selves, or else find one matter, specially, and leave it to the
" judges. It is by applying matter of fact and law together, and
" from their due consideration of, and right judgment upon both,
" that a jury bring forth their verdict."

" If a person should be indicted for doing any common inno-
" cent act, if it be but cloathed and disguised in the indictment,
" with the name of treason, or some other high crime, and
" proved by witnesses to have been committed by the party ac-
" cused, the jury, *though satisfied in conscience* that the fact is not
" any such offence as it is called, yet, because (according to his
" opinion) they have no power to judge of law, and the fact
" charged is fully proved, they should be bound to find the party
" guilty. And being so found, the judge may pronounce sen-
" tence against him, for he finds him a convicted traitor, &c.
" by his peers; and so juries, to use Mr. Care's words, *should be*
" *made mere properties to do the drudgeries and bear the blame of*
" *unreasonable prosecutions*. But all this is abhorred by the
" wisdom, and justice, and mercy of our laws."

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" Some jurymen may be apt to say—If we do not find accord-
" ing to the evidence, though we have reason to suspect the truth
" of what the witnesses swear, *or if we do not find as the judge*
" *directs*, we may come into trouble, the judge may fine us.
" Mr. Chase justly says this is a vain fear. No judge dare offer
" any such thing. *You are the proper judges of the matter*
" *before you, and your souls are at stake.*" It was a remarkable
" case before chief justice Anderson, in queen Elizabeth's time.
" A man was arraigned for murder; the evidence was so strong
" that eleven of the jury were presently for finding him guilty;
" the twelfth refused, and kept them so long that they were rea-
" dy to starve, and at last made them comply with him, and
" bring in the prisoner, not guilty. The judge, who had several
" times admonished this juryman to join with his fellows, being
" surprised, sent for him, and discoursed with him privately; to
" whom, on promise of indemnity, he at last owned that he him-
" self was the man that did the murder, and the prisoner was
" innocent; and that he was resolved not to add perjury and a
" second murder to the first."

" If the meaning of these words, finding against the direction
" of the court in matter of law be, that if the judge, having heard
" the evidence given in court, (for he knows no other) shall tell
" the jury, on this evidence the law is for the plaintiff or defen-
" dant, and you are, under the pain of fine and imprisonment to act
" accordingly, *and the jury ought of duty so to do, then every man*
" *sees that the jury is but a troublesome delay, great charge, and of*
" *no use in determining right and wrong.*"

" It is true, if the jury were to have *no other evidence of the fact*
" *but what is deposed in court*, the judge might know their evi-
" dence and the fact from it equally as they, and so direct what
" the law were in the case: Though even then the judge and
" jury might honestly differ in the result, as well as two judges,
" which often happens. But the evidence which the jury have
" of fact, is much otherwise than that. For, 1st. Being return-
" ed of the vicinage where the cause of action ariseth, the law
" supposes them thence to have sufficient knowledge to try the
" matter in issue."

" 2d. *They may have evidence from their own personal*
" *knowledge*, by which they may be assured, and sometimes
" are, that what is deposed in court is absolutely false; but to
" this the judge is a stranger, and knows no more of the fact
" than he hath learned in court, and perhaps by false depositions,
" and consequently knows nothing."

" To which end is the jury returned out of the vicinage, where
" the cause of action ariseth? To which end must hundreders
" be of the jury whom the law supposeth to have nearer know-
" ledge of the fact, than those of the vicinage in general? To
" what end must they have in many cases the view for exacter

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" information chiefly? To what end must they undergo the pu-
" nishment of villainous judgment, if after all this, *they must im-*
" *plicitly give a verdict by the authority and dictates of another man,*
" under pain of fine and imprisonment, *when sworn to do it ac-*
" *cording to the best of their knowledge?* A man cannot see by
" another's eyes, nor hear by another's ears; no more can a man
" conclude or infer the thing to be resolved by another's under-
" standing or meaning; and though the verdict being right the
" jury give, yet, they not being assured that it is so, from their
" own understanding, are forsworn, at least, in *foro conscientiæ;*
" and it is absurd to fine a jury for finding against their evidence,
" when the judge knows but part of it. *For the better and greater*
" *part of the evidence may be wholly unknown to him, and this may*
" *happen in most cases, and often doth.*"

The argument I have read is principally to show the absurdity and illegality of subjecting a jury to punishment when their verdict was not conformable to the opinion of the court. Yet, gentlemen, the rights, and province, and duty of a jury, are here fully laid down, and these have not in the smallest degree been altered, at least they have not been abridged, although at this day there is no power on earth that can call a juror to question for his verdict. It ever was the right and duty of jurors, in a criminal case, and is now yours to decide for yourselves, upon the whole matter before you, according to your own understandings, aud according to your own consciences.

There is one other important legal principle which should be strongly impressed on your minds, and should influence all your deliberations on the subject now under your consideration. It is that the act of congress under which the defendant is indicted, is a penal statute, and very highly so. It is therefore to be construed strictly, and always in favour of the accused, where it is ambiguous, or where there is room for doubting whether he has rendered himself obnoxious to its punishments. This principle is necessary to guard against the tyranny of laws.—For it would be better to leave the citizen to the mercy, or discretion of the judge, than to leave the judge a discretion, or latitude, in the construction of penal statutes. In one case there would be no excuse for an abuse of authority—in the other, the most odious partiality might shelter itself under an alleged mistake. In the English courts this principle has been carried very far. The parliament passed an act making it felony to steal horses; but this was adjudged not to extend to one who had stolen a single horse. So by another statute of England it was made a felony to steel sheep or other cattle, and it was determined this could only apply to the stealing of sheep; the words, other cattle, being considered too loose to create an offence. But, gentlemen, I must not longer detain you with preliminary discussions; I already find myself so much exhausted by fatigue, and oppressed by the excessive

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heat, that I shall want strength to accomplish the duty assigned to me.

By an act of congress, passed in the year 1794, it is provided in substance, that if any person shall, within the territory of the United States, *begin, or set on foot, or provide or prepare the means for a military expedition, to be carried on from thence against the territory of a power at peace with the United States*, such person shall be liable to a fine not exceeding three thousand dollars, and to imprisonment not exceeding three years.—And you are now, gentlemen, to determine, whether the defendant, as an offender against this law, has subjected himself to these severe penalties. There are several distinct charges against the defendant, which I shall proceed to examine in the order in which they are arranged in the indictment, which has pursued the order pointed out by the statute. The first charges are, that the defendant *did begin, and that he did set on foot* a military expedition. Though these charges are laid separately in the indictment, I shall consider them together, because, in my mind, they are similar, or at least in substance the same; if they are not, any difference between them must be in favour of argument. I shall offer to show that col. Smith neither begun, nor set on foot the expedition mentioned in the indictment. It is certain that two persons may together be the first movers in a transaction, or in other words, may begin or set it on foot; but then their acts must be simultaneous: if they are not; if one acts before the other, then it follows, of necessity, that they cannot both begin or set on foot. If the public prosecutor means to say that the defendant, Miranda, Armstrong, Lewis, Ogden, &c. are all equally guilty of this part of the charge, then he must show that they all acted together; for if they did not, the acts of some must have been posterior to the acts of others, and the first movers only could begin or set it on foot. No one can believe for a moment, that the defendant suggested or planned Miranda's expedition. Indeed, if to plan or suggest, or approve of the expedition, be to begin it, or to set it on foot, perhaps the testimony before you would as well warrant a verdict against the president or Mr. Madison as against col. Smith. However, gentlemen, it is useless to exhaust the little strength I have, and your patience, with many remarks on this branch of the subject. I cannot believe that the public prosecutor places much reliance on this part of his case. Every one must be satisfied that this expedition was began and set on foot by Miranda, and by no one else. He arrived in this country under the assumed name of George Martin, in December last, and placed his funds in the hands of Mr. Ludlow, from whom he drew a part, and ordered the residue to be paid to Mr. Ogden. Now if these circumstances have any connection with the expedition in question, they occurred long before col. Smith's name was heard of in relation to Miranda's adventure, and of course it must have

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been begun and set on foot before he meddled with it. Again, gentlemen, the public prosecutor has, by the examination of his witnesses, endeavoured to ascertain when the Indostan sailed. If there was any connection between that ship, and this expedition, (and if there was not, I do not know why this inquiry was made) then it appears that the enterprise of gen. Miranda was begun or set on foot as early as the 23d December, when that vessel left the port of New-York.

Again, it appears that major Armstrong contracted with Van Nest, the saddler, about the 10th January. Captain Lewis contracted with Fosbrook for arms, about the 1st of January; with Bernard Hart for cannon, about the 8th of January, and captain Lewis and major Armstrong made the important contract with the blacksmith, Stevenson, for pikes, on the 8th and 9th of January. Samuel G. Ogden purchased cannon of Mr. Corp, about the beginning of January, and the cannon for the Leander of General Stevens, on the 5th of January; and he purchased swords, &c. of Messrs. Murray and Sons, on the 4th of January. In all these transactions col. Smith does not appear to have had the least concern, nor do we hear of his having any connection whatever with the expedition, or with any person engaged in it either as principal or agent, until Fink, the butcher, speaks of circumstances which took place between him and the defendant, which he thinks was about the middle of January. The caption of Fink's muster roll is dated the 16th of January. And next we learn from capt. M'Lean, that about the last of January col. Smith engaged some supplies of him. When we consider that from the nature of things, the expedition must not only have been set on foot, but its plan must have been digested and settled, and that it must have been begun before the different tradesmen were employed in the early part of January it seems that absurd to say the defendant, who is not seen to take any part in the affair till late in the month of January, either began the expedition or set it on foot. It would be just as reasonable to contend that a man who put a roof on a house after the foundation had been laid, and the walls built up by another, or that one who should fix the ball on a steeple of a church, began or set on foot the edifice.

The next charge in the indictment is that the defendant did provide and prepare the means for a military expedition. If penal laws ought to be precise and definite, as to the offences which they denounce, and if punishment ought not to be inflicted under those that are not so, then may the defendant expect an acquittal on this ground. For can any thing be more ambiguous, uncertain, and indefinite, than the meaning of these words of the statute? What is providing or preparing the means for a military expedition? Why every man who builds a ship, who manufactures arms or gunpowder, is preparing the means for a military expedition. The peaceable farmer, who tills the earth, and sows his crop, may be

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answerable under this law. Nay, inasmuch as men are an essential means of a military expedition, and there must be children before there can be men, I do not know but that marrying and consummation of matrimony may, under this law, be criminal acts. Certain it is, that if the defendant be guilty, there is not a witness that has been examined on the part of the prosecution, who is not equally so. What has been more common than to make warlike equipments from our ports? Most of the witnesses who have been examined, have heretofore furnished articles of the same kind for other ships or vessels. To sell articles for a military expedition, must be as much the providing and preparing the means, as to buy them. And if the president chose to order it, one half the merchants in town might be dragged to this bar, to answer as offenders against this law. But it will be said by the counsel opposed to us, the defendant is not charged merely with providing the means of a military expedition, but with providing the means expressly for a military expedition, and the means he did provide were men and money. Let it, for the sake of argument be so; the question then is, was this a military expedition?

Before I proceed on this part of the subject, allow me to call your attention to the testimony of Fink the butcher, not that I think it necessary that you should disbelieve any part of his testimony, in order to acquit the defendant, but because, if you should believe all that Fink has said, the conduct of col. Smith would appear to you in a very unmerited and odious point of light. If, indeed, he engaged the men who are now with Miranda, under representations that they were to be in the service of our government, and were not to leave the United States; if he did pretend that he had orders from the president for enlisting them, his conduct would be altogether inexcusable, although it might not subject him to the penalties of the law. Is it not remarkable, gentlemen, that if Col. Smith should have made these representations to Fink, that he should not have made similar pretences to any other witness who has been examined in this cause; and that to those who applied to him immediately to learn the object and nature of the expedition, and who it would have been most his interest to deceive, if he could have used deception, his declarations were altogether different from those which Fink has represented as made to him. Col. Smith told other witnesses, who questioned him on that subject, that the expedition was sanctioned and approved by the president of the United States, and that the men were not to serve out of America. And this was true. But when Colonel Smith said the expedition was approved by the president, Fink has understood that it was ordered by the president, and when Fink was told that the men were not to serve out of America, he understood that they were not to leave the United States. Very possibly, for he seems to have stupidity equal to any degree of ignorance, he did not know that America was more extensive than the

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United States. It is obvious that col. Smith could not have intended to practise a deception of this sort; for in the paper which was written by col. Smith, and which was given by him to Fink, as containing the terms on which the men were to be engaged, they have no other assurance than that they were neither going into English or French service. With respect to the bundle of papers which col. Smith showed to Fink, instead of being orders for enlisting the men, as Fink says col. Smith told him they were, they in fact were no other than a bundle of letters, one of which was the letter from captain Duncanson, which you have heard read; in which bundle, col. Smith told Fink, were letters he had received from Washington, which contained, not orders from the president, but which informed him of the consent and approbation of the president. But Fink having formed his own ideas of the agency in which he was employed, accommodated every thing he heard to his own opinion; we may therefore disbelieve what Fink says, without imputing to him wilful perjury. But however charitably we may be disposed to think of Mr. Fink, when he is speaking on his oath, it is certain that he has shown himself very regardless of truth, when not awed by that solemnity. Anxious to complete the business he had undertaken, he was willing to accomplish it at the expense of the grossest deception. According to his own story, he told the men he engaged, sometimes that they were to go to New-Orleans, sometimes that they were to escort the mail, and sometimes that they were to serve as a guard to the president; and yet he does not pretend that these representations were authorised by the defendant, or by any other person—Nay, so far has he been influenced by his own ideas on this subject, that you find one of the papers which he has produced to you is indorsed "*Muster Roll for the President's* "*Guard*," and yet it is not pretended, by Mr. Fink, that this indorsement was made by the authority, or with the knowledge of the defendant. Indeed, it is not known by whom this indorsement was made; not by Mr. Fink himself, for it seems he can neither write nor read. So much, gentlemen, for Mr. Fink. Let us return to the question, whether this was or was not a military expedition. I presume it will be admitted that there can be no military expedition, where there are no military men; and if those engaged by Fink were not of that character, there certainly were none embarked in the Leander. I ask, then, what circumstance it is that gives these men who were contracted with by Fink, the character of military men? Is it that some uniform coats were made for them by the taylors who have been examined here? But, gentlemen, taylors cannot make soldiers. A blue and red coat will not make a military man, any more than a black coat will make a lawyer, or sitting on the bench will make a judge. I would say that no man can be a military man or a soldier, unless he is under some sort of obligation to serve and to

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submit to military discipline for some given time; if it be not so, what will be the consequence—you may be served to the moment of necessity, and when that arrives, at the very point of contest you may get deserted; at the sight of an enemy your forces might desert you, and say, we were only bound to serve you as long as we pleased; we do not please to fight, and the prospect of a battle dissolves our contract. The men engaged by Fink were at liberty to quit their employment whenever they pleased. It was perfectly understood that they were to go from hence to a friendly island, and from thence might return if they pleased. Indeed, this liberty which they had reserved to themselves by their contract, they chose to exercise; for before they sailed they all left the ship and came on shore, and did not join the expedition again till a new contract had been made between them and a Mr. Durning, with which last contract it does not appear the defendant had any thing to do; and in fact when at Aruba, they were all landed, and did not reimbark till they had entered into new engagements. I do not know, then, on what grounds you can be called upon to say that these were military men, unless, indeed, you should adopt what seems to have been the idea of Fink, and suppose that because their names were written on a list, they must have been enlisted, in the military sense of that word. Mr. Attorney, aware of the necessity of imposing on these men a military character, has been fond of using military terms, and we have heard him talk of muster-rolls, soldiers, enlistments, and guards, as familiarly as if he were in a camp. Possibly it may have been intended to make those men soldiers when they arrived at the friendly island to which they were in the first instance bound, and I will not say that they did not, after that, become so. But we shall see by and by that it makes a mighty difference whether the expedition had a military character when it left this, or whether it became so afterwards. I am informed, gentlemen, that the law under which the defendant is now indicted, was passed when Mr. Genet was endeavouring to enlist men within the jurisdiction of the United States, to serve the republic of France, against Spain. He had issued military commissions to officers, under the authority of the French government, and was forming regiments, and a force regularly organised to attack the Spanish provinces. This law was passed under a federal administration, in order to stop a proceeding so derogatory to our government, and inconsistent with our duty as a neutral state. If this be so, it will afford us strong grounds to infer that the statute will not apply to the defendant's case, and it is a perversion of the law, to bring under its operation acts which are so very different in their nature from those which were in contemplation by the legislature when the law was passed. Is there not an obvious difference between raising forces in a neutral country under the authority of a foreign goverment, issuing military

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commissions, enlisting soldiers by virtue of the same authority, and an individual contracting with men to engage in an enterprise, a hostile enterprise, if you please, against a foreign state? The first would be providing and preparing the means for a military expedition, and would be the offence against which the law is directed; but the latter would be merely an enterprise of individuals, not justifiable, I admit, in the citizens of a neutral state, and which ought to be prohibited by a particular statute, if it be not by general law—But which is not prohibited by the statute under which the defendant is indicted.

To refute this argument it must be said by the counsel opposed to us, that every hostile expedition against a foreign territory, is a military expedition, or in other words, that there is no difference between a hostile expedition and a military expedition. In answer to this, we ask, why then does the law use the term, military? Certainly it is a description or quality of the acts it meant to punish. Will you, then, in the application of a penal statute, leave out a word of so much importance, in order to make the law more extensive in its application? If you will do so, instead of its being made unlawful by this act to prepare the means for a *military* expedition, you leave out the word military, and make it illegal to prepare the means for any expedition against a foreign territory.

To show the force of this reasoning, let us for a moment suppose that Miranda had sailed from this port with no other intention than to land on the shores of Caraccas—to erect there the standard of liberty, and invite his countrymen to enlist under his banners, and that he had provided arms to put into the hands of the friends he should meet—would this be a military expedition? I think not, most certainly; and unless the opposite counsel mean to confound all language, I do not believe that they will affirm that it would be so. And what difference can it make that Miranda had with him thirty or forty men. It may be said, however, that this enterprise was characterised by the quantity of warlike stores which Miranda took with him; among these has been enumerated a printing-press. This, to be sure, may be a very formidable engine to effect a revolution, but I never before heard it reckoned among the muniments of war. As to the rest, it cannot be denied but that Miranda had with him a large quantity of warlike stores and arms, more than sufficient for the use of the Leander. But does it not appear, from the testimony of all the witnesses, that cannon, balls, powder, arms, and every thing of the kind, have long been mere articles of traffic? that our merchants have been in the constant habit of importing and exporting, of buying and selling them? And it appears that this very ship has been before supplied by some of the witnesses, with the same sort of articles, and that she has had the same warlike equipments when she has been before bound to the island of St.

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Domingo, which was her port of destination when she left this. And do the counsel for the prosecution mean to contend that all our St. Domingo merchants are offenders against this law? If so, there is hopeful employment for our criminal courts.

We have now, gentlemen, considered the acts which are charged against the defendant; that is to say, that he did begin, and set on foot and prepare the means for a military expedition. Let us, now, for the sake of the argument, suppose that he did do this; let us suppose that the defendant did begin, and set on foot, and prepare, the means for Miranda's expedition, and that expedition was a military one. Yet I beg you to mark well, that the defendant is not an offender against the statute on which he is indicted, unless it was first a military expedition to be carried on from the territories of the United States; and secondly, unless it was carried on against a power at peace with the United States. I shall then proceed to examine these two important points, and in doing this, I shall observe what brevity I may, not only in regard to your patience, but to my own strength, which I fear you will too easily perceive, is altogether inadequate to the task I have undertaken.

The statute forbids any one within the territory of the United States to set on foot, or to provide or prepare the means for a military expedition to be carried on from thence; that is, from the territory of the United States. The question then, now is, was the expedition of Miranda to be carried on from the United States? On the part of the defendant, we contend, it was to be carried on from Jacquemel, and not from the United States.

I presume it will not be denied, that the means for a military expedition, to be carried on from any other place than the territory of the United States, may be lawfully provided and prepared within the United States. If the expedition, when it left our harbour, had been intended to proceed immediately to the Spanish territory; if it had been at that time prepared for offensive operations; if they had been enlisted as military men always are; if there had been officers commissioned by any foreign power; then, no doubt, it would have been an expedition to be carried on from hence. But if, on the contrary, it was intended that the expedition should proceed to Jacquemel; that it should there receive reinforcements, that it should be there organised, and the persons engaged in it be there put in military array, and there receive military commissions: then it was a military expedition to be carried on from Jacquemel, and not from the United States. Let us then see what is the testimony on this point. The vessel cleared out for Jacquemel; she was then joined by the Emperor; the commissions were then distributed, and the contract with the men was, that they should be allowed to return from the friendly island to which they were in the first instance bound, if they did not choose to proceed. Besides, one of the most material wit-

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nesses on the part of the prosecution, swears, that when they left the port of New-York, the arms were not fit for use; they were packed up as merchandize in boxes, and he expressly swears, that they were by no means in a state to carry on a military expedition when they left this. This witness says, also, that if they had been near the shores of the Spanish provinces at the moment they left the hook, they were not prepared for any hostile enterprise, and that they were not so until their departure from Jacquemel. Is not this testimony conclusive to show, that though the means were provided here, yet the expedition was to be carried on against the Spanish provinces, from Jacquemel, and not from the United States. Suppose Miranda had, at sundry times, and by sundry vessels, shipped military stores from this to St. Domingo; that he had afterwards gone there himself, and had, with these stores, embarked from thence in an enterprise against the Spaniards; would this have been considered as a military expedition carried on from the United States, because the military stores were purchased within the United States? Certainly not; and why should it be different when the stores are exported in the same vessel in which he was himself a passenger. The force of this argument will appear more obviously, if, in reading the clause of the statute now under consideration, we leave out the words "*from thence*." The statute now reads as follows: "If any person shall, within the territory of the United States, begin or set on foot a military expedition, or enterprise, to be carried on *from thence*, against the territory or a power," &c. Now, let us read the statute, and leave out the words "*from thence*," and it will have quite a different meaning from what it has, as it is actually written. In the one case, to prepare the means for a military expedition to be carried on from the United States, or to be carried on from elsewhere, would be unlawful; whereas, the statute makes the offence, in preparing the means for an expedition to be carried on from the United States; and this the public prosecutor would do, should he leave out the words, *from thence*, or not regard them, and by this means stretch the meaning of the law, to make it meet the case of the defendant.

But again, let me remind you, gentlemen, that this is a penal law, terrible in its denunciations; and that you cannot add or take from it a word, nay, a letter, to extend its operation against the accused. The tyranny of the laws would indeed be abominable, if they could be rendered subservient to the wishes of a government, or a court, or be construed to meet one case or another, as exigencies may require.

2dly. The indictment charges, as by the law it must, that the expedition was intended against a power with which the United States were at peace, and it alleges that that power was Spain; so that if there was not peace between the United States and Spain,

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the defendant is not guilty of an offence; at least he cannot be convicted on the indictment to which he now answers. Whether there was, or was not peace between this country and Spain, is a question of fact, and as such must be, gentlemen, for your determination. And here I must call to your minds, the law that I read at the commencement of my address; and by which, I shewed it to be your duty, to form your verdict from notorious facts within your own knowledge, as well as from the oral testimony given in court; and if you have this right, certainly, gentlemen, never was there a case before a jury, which more strongly demanded the exercise of it. Why, I need not say: it is sufficient that you have witnessed our repeated, and vain attempts to get testimony before you.

It is certain, gentlemen, that there was not, when Miranda's expedition was set on foot, a declaration of war by this country against Spain, nor was there, that I know of, a declaration of war by Spain against the United States; nor is it necessary to make our defence on this point good, that there should be either of these; if there was actual war it is sufficient. This, however, is an argument which the counsel opposed to us, have heretofore contended against, and no doubt they will again attempt to maintain their position; that this country must be considered as at peace, until there has been a declaration of war, by an act of the congress of the United States, which body has alone, by the constitution, the power of declaring war. There is a mistake, if it is supposed that we *contend* in the face of the constitution, that the president has a right to declare war. But, gentlemen, neither the president of the United States, nor the congress of the United States, can prevent this country from being at war, if her enemies choose to make war upon her. There may be war, not only without a declaration, but against the will of the government, or any of its branches. If a foreign government should commit flagrant and repeated acts of violence and hostility against our people and territory, can it be said that we are still at peace? No, gentlemen, not unless this absurdity be admitted, that we may be at peace with Spain, when Spain is not at peace with us. Let us suppose that at this moment a Spanish army had invaded our territory, and had actually taken possession of the city of Washington; let us suppose that this city was now attacked by a hostile fleet, should we yet be at peace? Though our capital was in possession of an enemy, and our city battered by the cannon of our foes, yet, according to the arguments of the adverse counsel, we should be at peace until congress should be assembled, and until an act might be passed, declaring that we were at war. I think, gentlemen, it is obvious that there may be hostility, without a declaration of war, and if there was that hostility between this country and Spain, when Miranda's expedition was going on, then this country was not in that state of

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peace which it must have been, in order to make the agent in that expedition offenders against the statute under which the defendant is indicted. There have been actual hostilities between this country and France, between this country and the Barbary states, and during these hostilities were we at peace? Suppose a military expedition had been fitted out from the United States, against either of these powers while there was this state of hostility, could it have been said that it was against a power, with which the United States were at peace? I think I may say certainly not. And yet, gentlemen, has there ever been a declaration of war by congress? But the counsel for the prosecution have said, that a war without a declaration by congress, was a mongrel, half-way kind of war. Be it so. If there was not perfect and absolute peace between the two countries, it is enough. It was not an offence under this statute to set on foot an expedition against the Spanish territory, unless Spain was at peace with us in every sense of the word. If there was but a mongrel, half-way war, there was but a mongrel, half-way peace. But the statute requires a perfect peace. If it be not so, the statute must be read differently from what it is written; instead of making it an offence to set on foot a military expedition against the territory of a nation with whom the United States are at peace, which are the words of the law, you must read, that it shall be an offence to set on foot a military expedition against the territory of a foreign state, against which congress have not declared war. In a word, we say, that the statute does not reach the defendant, unless, when Miranda's expedition was set on foot, there was peace *de facto*, between this country and Spain. And how was this? Have you not heard, gentlemen, from the highest authority, that Spain, by the regular officers and soldiers of her government had invaded our territory; that she had seized our citizens, and plundered their property; that she interrupted our commerce, and captured and destroyed our vessels, without any other pretence, than that of being our enemy; and yet Spain was at peace with us? Then God only knows what is war! Again, the president by the constitution, is to give to congress information of the state of the union. This, undoubtedly, means not only its internal state, but its state in relation to foreign powers. Now, though the president cannot declare war, yet, undoubtedly, he may inform congress, either that war is made, or declared against us, and after such information from the executive, have we not the highest authority for saying the country is not at peace. I have but one other observation to make, before I take leave of this part of the subject, and I beg you to remember it, because it is an answer to much that we have heard, and to much that I have no doubt we shall hear from our opponents; it is this; that we do not contend, that though there was an actual, or declared war with Spain, that it wouldb e lawful for our citizens, of

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their own head, and without any authority or commission, to engage in military enterprises; but we say this statute can have no application if there was war of one kind or another. The defendant may have offended against the law of nations, or against some other law, but not against the statute on which he is indicted.

I am sorry, indeed, gentlemen, to take up so much of your time; it cannot however be so disagreeable for you to listen to me longer, as it is painful for me, sinking as I am under fatigue, to proceed. Yet I shall not discharge my duty, unless I put the case of my client before you in some other points of view.

Whatever the defendant did with respect to Miranda's expedition, was done by him with the knowledge, consent, and approbation of the president of the United States, and of his minister, Mr. Madison, the secretary of state. Notwithstanding that the testimony which we might ourselves have offered you on this subject has been excluded, the fact appears from the examination of their witnesses. They have attempted to criminate colonel Smith by his own declarations. These declarations became legal evidence, and are to be taken as strongly when they make for, as when they militate against us. Colonel Smith's most confidential friends have been sought for on this occasion. Those to whom he is supposed to have unbosomed himself, without reserve, have been brought here to tell you what has passed between them and the defendant, when he thought his words were buried in the breasts of his friends. There is not a single person to whom he has spoken in confidence on this subject, and who has appeared here as a witness against him, who did not testify, that he always declared that he was acting under the sanction of the president of the United States. I refer you to the testimony of colonel Swartwout, colonel Platt, doctor Douglass, colonel Ripley, and Mr. Robson. The last, colonel Smith assured upon his honour, that he was acting with the approbation of the secretary and president. Nay, more, gentlemen, it appears from these same declarations of colonel Smith, of which the counsel for the prosecution have chosen to give evidence, that colonel Smith had been named to the president and secretary, as a person whom Miranda wished to engage in his enterprise; that the president had refused to give colonel Smith a license to leave his office, but thought him a fit man. In addition to all this, let me call on you to read and consider with attention, the letter from captain Duncanson to colonel Smith; recollect at the same time, Miranda's visit to Washington; his reception there; the notoriety of the preparations for this expedition, upon his return. That every thing was done in the face of day, under the eye of the collector of the port; that the ship was lying, and received her equipments within a few yards of his house; and then ask yourselves

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whether the expedition was unknown to the president of the United States? The counsel for the prosecution, after having excluded the testimony we offered on our part as to this point, cannot deny the knowledge we impute to the president. They have contended, however, and will no doubt again contend, that whether the president had knowledge of this expedition, or whether he sanctioned it, or even whether he ordered it, is altogether immaterial. Because, say they, the president cannot authorise an illegal act. The expedition was illegal as long as there was no declaration of war by congress. It is not a difficult thing for ingenious counsel to pervert the arguments of their adversaries. Let me repeat that we do not hold so irregular, so disorganizing a doctrine as that the president may make that legal which is not so by the laws. Neither do we contend, in the face of the constitution, that the president can declare war. But we say, that such a state of things may exist, and did exist at the time of Miranda's expedition, as that an individual, acting under the sanction of the chief magistrate, shall be justified in what he does under that sanction; and if there is any illegality in the acts, he who gave the sanction must answer for it, and not the individual. It cannot be denied but that congress may declare war, without making their declaration public. If they had done so, the president might lawfully have sanctioned the expedition. When, then, the defendant found that the enterprise of Miranda was approved of by the president, was he not justifiable in supposing, that such approbation was lawfully given? Should he have stopped to inquire of the president whether there was or was not an act of congress declaring war against Spain? If such measures of offence or defence had been intended, a declaration of war, if there had been one, would have of course been a secret When you advert to the situation of our affairs with Spain at the time in question; to the conduct of the national legislature; to the general expectations and belief, and the rumours that were then spread abroad, you will then judge what reason the defendant had to suppose that the president was authorised, by a constitutional declaration of war, to set on foot an enterprise for which the defendant is now to answer? In a word, gentlemen, the defendant's justification in this respect, rests upon a principle of law and reason, applying as well to the highest as to the lowest officer of our government: that where a magistrate may have, under certain circumstances, power to grant an authority to another, if he grants the authority, it is to be taken so far as the person to whom the authority is granted is concerned; that the facts which would warrant the granting the authority did exist, and if they did not he who gave the authority must answer it, and not he who acted under it. As for example, a judge cannot grant a warrant for arrest, without oath; yet if he do so, he who obeys the warrant shall presume that it was granted, and shall be justified by it, although the

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judge shall be answerable. So, in this case, if there had been a declaration of war, the president might have lawfully authorised the defendant to prepare a military expedition. The president did authorise the expedition of Miranda. The defendant was therefore to presume, that there was a declaration of war; and if there was not, the president is to answer for it and not the defendant. Though we admit that the president cannot declare war, yet we insist that he may take warlike measures, and authorise others to take them, though there should be no declaration of war. But this the gentlemen will say can only be in defence, and to resist immediate violation. But who shall judge of the proper time or occasion to use these defensive measures—shall it be the president or the citizen on whom he may call to engage in a military enterprise against the enemy?

Again, gentlemen: all guilt is rooted in the mind; and if it is not to be found there, it does not exist. Whoever will contend against this proposition, must fight against human nature, and silence his own conscience. It is true, there are certain technical rules of which we have heard, and of which we shall no doubt hear again, which are much more easily repeated than justly applied. They are such as these: No man can shelter himself under ignorance of the law. If a man violates the law it shall be intended that he designed to act illegally. No doubt, gentlemen, these are wholesome and necessary maxims: but if you will apply them to all cases, and under all circumstances, you will punish the maniac who commits violence in his phrenzy, and the well-meaning physician, who, mistaking the disease, or his physic, gives poison instead of medicine. But I know of no act in which the crime does not, in contemplation of law, consist in the intent; and where it can be manifested that the accused did not intend to do wrong, he is to be holden guiltless. If a man breaks into a house in the night time, it will be justly presumed that he did it with intent to steal, and it is felony. But if he can show that his heart was filled with the charms of his mistress, and that his only object was access to her chamber, though he might be liable to a civil suit, no criminal prosecution could be maintained against him. If you would convict a man of passing false money, you must show that he had an intent to defraud. If a man takes the property of another, he cannot be convicted of larceny till it appears that he did it with intent to steal. So in this case, if you are satisfied that the defendant did not intend to offend against the laws, you cannot say he is guilty; much less can you do so if you shall be convinced, from the testimony which has been offered to you, that he thought, and had good reason to think, that the acts with which he is charged were sanctioned by the laws. What could be higher evidence of this than the approbation of the chief executive magistrate, whose constitutional duty it is to see that the laws are duly executed? And, gentlemen, in considering how far

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the defendant had reason to think his conduct was justifiable, let me ask you to take into view again the then existing state of the nation. You must recollect the violence that had been committed against us; you cannot be ignorant of the president's communications to congress; neither can you have forgotten that there was an universal expectation that the United States had declared, or would declare, war against Spain. All these circumstances, you must easily perceive, ought to have great weight with you, when you are judging of the criminality of the defendant.

Though conscious, gentlemen, that much yet remains to be said in favour of the accused, I am obliged to yield to want of personal strength. The previous fatigues of this cause, and my present exertions, have completely exhausted me. Happily the defendant's fate does not depend on the ability of counsel. He may, with confidence, rely on his innocence, and your impartiality and discernment. You well know the defendant, and his character; you know his present situation in life, and as well as what it has been; you know that he has a large and affectionate family, who are at this moment waiting with trembling anxiety, to learn his doom from your lips. Should you pronounce him guilty, you condemn him to years of close imprisonment. Nay, gentlemen, possibly to gaol for life; for if the court should think proper to inflict upon him the very heavy fine which is a part of the penalty of this statute, he must lay in prison until it be paid, or until the executive shall be pleased to pardon him. His having means of paying a fine, has already been too surely guarded against, by depriving him of an office, which was his only support. And what hope can he have of mercy from those by whom he has been seduced, betrayed, and prosecuted; who hope to expiate their own errors by his punishment; and who do not hesitate to avow, that this prosecution originates, in part at least, in their fear of the vengeance of a foreign government.

Finally, gentlemen, I trust you will never suffer yourselves to be persuaded that there are certain technical rules of law, so opposed to humane feeling, and common sense, as to oblige you to pronounce a verdict against the defendant, though you should be convinced, in your own minds, that he is not criminal. If you believe that he did not intend to offend against the laws, but on the contrary, that he thought he was rendering service to the state, under the approbation and sanction of its chief officers; in a word, if you believe in your hearts that he is innocent, you will say that he is not guilty—and your verdict shall be approved by the world—your names shall be handed down to posterity, as the guardians of the sacred rights of trial by jury. But above all, you will have the approbation of your own consciences.

Hoffman. Gentlemen of the jury—It is almost impossible to address you in this cause, trammeled and restricted as we are in our defence, without pursuing an already beaten track

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but, I am encouraged by the reflection, that the voice of truth cannot be too often heard, nor the path of justice too frequently travelled.

Gentlemen—There has been an intemperate zeal displayed in this prosecution, unprovoked by my client, and ungracious in those, by whose commands he has been accused. The public prosecutor, in opening the indictment, has described the actions of colonel Smith in unqualified terms of the most aggravated guilt. His conduct has been stigmatised as base, his motives as dishonourable, his views as mercenary and unworthy. Excluded from a full investigation of the merits of this cause, curtailed of his most essential testimony, the avenues to a fair and ample elucidation of facts and circumstances closed against him; colonel Smith has been produced before you, a fettered victim.—His accusers exulted in the security and certainty of the impending blow—while darkness, and silence, and mystery, were invoked to assist at the sacrifice. The simple fact was all they chose you should behold; from that only were you to acquaint yourselves with the nature of his offence. Shrouding themselves in secrecy, and confiding in their concealment, they have already (but I trust vainly) anticipated their triumph and justification in your verdict. Nor is this all, gentlemen; they have tortured the purest affections of the heart into unwilling instruments of persecution. They have violated the sanctuary of friendship; they have penetrated its hallowed recesses; they have dragged forth the friends of his bosom, those "life keys" of social intercourse: they have wrung from them his unsuspecting confidings, and compelled them to be reluctant engines in the hands of his oppressors. Yes, gentlemen, they have sought to surprise their prey in his unguarded hours; his hours of social intercourse; when the heart opens spontaneously, and reposes its dearest secrets in the bosom of friendship. Is not this ungenerous? Is it not persecuting? Has he not just cause to complain of so rigorous, so cruel a procedure? Fortunately, however, for the cause of outraged friendship, the artifice has recoiled on the heads of its contrivers. It has placed colonel Smith on the elevated ground, on which alone he was ambitious of standing.—Indignant though he must have felt, on beholding the companions of his soul, dragged forth as accusing witnesses against him; still he triumphed in the confidence, that their evidence could only tend to establish the purity of his motives, the correctness of his views. The more they have exposed his confidential conversations, the more have they furnished satisfactory and convincing proofs of his innocence.

Do not mistake me gentlemen; I would not claim for my client your commiseration. Injured though he is in the extreme; assailed in the tenderest points, where, as a man of feeling and a man of honor, he is most susceptible; yet I should

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degrade him in his own estimation, were I to seek his acquittal on any principle, but that of justice; and justice too, measured by law; but not entangled in nets of form, nor perplexed by cobweb rules.

Never perhaps did man under similar circumstances, exhibit more equanimity of mind. Throughout the whole of this singular prosecution, from its commencement until its present stage, he has continued serene and undisturbed. When thrust by the hand of power from an office honourable and lucrative; an office essential to his support, he disdained to murmur or complain; he felt the blow most deeply, but sustained it with manly fortitude; for he knew it was unmerited. When arraigned at the bar as a criminal, strong in the rectitude of his views, he was still unmoved. When forced upon this trial, on the application of the public prosecutor, under circumstances of unusual severity, and peculiar hardship; his counsel, sympathizing in the critical situation of their client, were alarmed for the event; he, continued calm and cheerful, for in your verdict he anticipated a proud consolation. He has been before your eyes during the whole progress of this trial; and you have witnessed the firmness and dignity, which extorts from me these expressions of admiration. If, however, his anticipation of an honourable acquittal should suffer disappointment; if mistaken and rigid principles of law should compel you to pronounce him guilty; even then, the punishment that will await him, and the penury which may follow to his dearest connections, will not appal his mind. That spirit which has hitherto sustained him, will not be broken. He may feel that he is the victim of perfidy, a sacrifice at the shrine of unfeeling and iniquitous policy; but his bosom will remain unwounded by the stings of self reproach; his heart untortured by the secret upbraidings of guilt. Happy for those who seek his ruin, could they boast of the same consolation! But success would impart little pleasure to minds corroded by remorse; and conscience would mingle bitter monitions in the cup of their rejoicings.

Gentlemen, the cause before you is of the highest importance. It involves the discussion of a doctrine, in which we are all deeply interested. The community look to your decision with uncommon anxiety. They expect from you a verdict, confirming a principle of law, important to personal safety and freedom.—They consider you as a tribunal, interposing its protecting barriers against official oppression, however masked by legal forms, or disguised by judicial ceremonies.

You, gentlemen, are constitutionally the judges, in criminal cases, both of law and of fact. This is the vital principle of our criminal code, and is acknowledged as the invigorating spirit of life and liberty, in the common law of England. There was a time, however, in the history of English jurisprudence, when

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this principle was so shackled by the hand of power in state prosecutions, as to be obstructed in its operations and deprived of its beneficial effects. *A time*, when the crown could single out its victim, and interdict all exonerating testimony from the object of its caprice or its vengeance. When judges, those dignified expounders of the law, those guardians of private rights and public safety, could warp the rules of evidence for the convenient suppression of truth, and become the partizans, or rather the tools of those who created them. *There was a time*, when counsel shrunk from their duty, hesitated in supporting with manly independence the cause of the oppressed, and tamely submitted to be brow-beaten by a time-serving court. Yes, gentlemen, *there was a time too*, when juries became accomplices in this scheme of oppression; forgot the duties of their high station; yielded up their rights to gratify the tyrannical views of the crown, and surrendered their judgments to the dictatorial opinions of an obedient and courtly judge. A period such as this could not long continue: the nation arose, mighty in its justice; the offended laws were vindicated, and the revolution in England restored—to jurors their invaluable rights—to Englishmen, the grand bulwark of their personal liberty.

God forbid, that these remarks should be applicable to our own government, or characterize its tribunals: wisdom, however, may be learned from the history of other nations, and caution, from a knowledge of the rocks, on which they have been wrecked.—*State prosecutions* peculiarly demand your jealous vigilance: in those, of all others, the jury should be acquainted with every feature and complection of the offence. They should feel the awful responsibility of their situation. While careful to preserve the operations of the law inviolate; while prompt to punish any trespass against the authority or dignity of their government; they should be eagle-eyed in their judgment, lest by the duplicity of a feeble, but oppressive executive, they might be refused a knowledge of the whole truth, and be made the passive instruments of successful persecution.

A jury completely on their guard against the machinations of power or party, unbiassed in their judgments, invincible in their integrity, will always remain the dignified supporters of public justice, the firm palladium of private safety. In vain may a pusillanimous executive seek to cast the opprobium of its unworthy or ill advised projects, on the head of an unoffending individual. In vain may it attempt, under the specious semblance of justice, to appease the injured laws and insulted dignity of its country, by immolating the innocent as a peace offering. In vain may governmental judges pronounce venal decrees in our forums. You, gentlemen, rise up, inflexible in right, omnipotent in justice, to protect the innocent, to shelter the persecuted, and to check the aggressions of unprincipled authority.

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In this country, gentlemen, we have nothing to fear from the open exercise of lawless power, or the conspicuous tyranny of official oppression: these evils would be too manifest to pass unnoticed, and would only be noticed to be avoided or destroyed. The genius of our revolution does not slumber in oblivion. That spirit, which once inspired us with the intrepid resolution of asserting our rights, must render us firm in maintaining them; must ever animate us to prostrate the public invader of our liberties; and to hurl down vengeance on him, who should seek to erect a tyranny in our country. No, gentlemen, open violence is not to be dreaded; it is that insidious power, which shall assail personal freedom under the dissembling garb of constitutional duty: which shall insinuate itself into our courts, and veil its nefarious designs in the forms of legal proceedings: which shall enter, with sacrilegious craft, into the hallowed temple of justice, and make the testimonial rules of law subservient to its purposes. Yes, gentlemen, that power, which thus moves in clouds and darkness, and approaches us, disguised in the sacred mantle of truth and justice, is alone to be apprehended; to be watched with the most unceasing vigilance. That implicit confidence, which we are accustomed to place in the men appointed to preside over our safety; that veneration, with which we are accustomed to regard the institutes and laws of our country, as all potent to protect, may strangely operate against our rights and our interests. Lulled by an honest, though incautious security, jurors may be found sleeping on the post of danger, when the insidious enemy shall lay in ambush; and victim on victim may ascribe their destruction, to the inactivity of those in whom they confided for protection.

Gentlemen; I repeat to you, and I repeat it with confidence, that you have a *constitutional legal right to judge of the law and the fact* in criminal cases; and before I conclude the defence in this cause, I trust I shall convince you, that it is a right *fit and important to be exercised on this occasion.*

However satisfactory, gentlemen, the general reasoning may appear on this question, yet I wish not to quit the argument, whilst I am able to remove any possible doubt, by a reference to cases of acknowledged authority. In a cause of less moment, I should apologise for this trespass on your attention; but in a cause of such general concern, and so peculiarly eventful to my client, I confide fully in your patience, while I indulge in additional references to our law books; or perhaps repeat and extend the ideas already suggested by my associated friend.

Gentlemen, I wish the justness and legality of the principle to be fixed in your minds, immutable as the verdict you are about to render. I do not pretend to conceal from you, that on the application of this principle, the acquittal of col. Smith is to depend; and on your *exclusive* judgment of the law, which arises

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of the facts existing in this case, he solely reposes his hopes and confidence.

The first authority which I shall read, is contained in the case of the dean of St. Asaph, in the report of Stockdale's trial; page 124. The dean of St. Asaph had been indicted for a libel, and on the trial the jury were charged, that they were bound to convict, on proof of the publication, and of the meaning imputed to it by the innuendoes on record, however innocent or meritorious they might consider the matter published. Upon this charge the defendant was convicted. A motion is made for a new trial; in which motion the rights of jurors are considered and vindicated by the splendid talents of Mr. Erskine; in opposition to whom an advocate, equally eminent at the English bar, appears as the counsel for the crown. To the admissions of that crown lawyer, I would direct your attention. I shall also take the liberty of reading to you the observations of the present lord chancellor of England; since, however unsuccessful at the moment, his argument finally triumphed: and the British parliament, by a declaratory law, asserted the right of a jury to judge and decide on the whole matter. "Looking back," says he, "upon the antient "constitution, and examining with painful research the original "jurisdiction of the country, I am utterly at a loss to imagine, "from what sources these novel limitations of the rights of juries "are derived—even the bar is not yet trained to the discipline "of them. My learned friend, Mr. Bearcroft, solemnly abjures "them. He regrets to-day what he avowed at the trial, and "is even jealous of the imputation of having meant less than "he expresses; for, when speaking this morning of the *right* of "the jury to judge of the whole charge, your lordship corrected "his expression, by telling him he meant the *power* not the "*right*, he caught instantly at your words; disavowed your explanation, and with a consistency which does him honour, declared his adherence to his original admission in its full and "obvious extent."

"*I did not mean*," said he, "*merely to acknowledge that the "jury have the power, for their power no body ever doubted, and "if a judge was to tell them they had it not, they would only have "to laugh at him and convince him of his error, by finding a general verdict, which must be recorded. I meant therefore to consider it as a right, an important privilege, and of great value to "the constitution.*" How honourable indeed to Mr. Bearcroft was this language; the zeal of the prosecutor is lost in his honest attachment to the laws and constitution of his country.

Again—the writers on the principles of the common law all unite in the same doctrine. Justice Blackstone, in his celebrated Commentaries, speaking of the nature of trials by jury, thus expresses himself: "But it holds much stronger in criminal cases; "since in times of difficulty and danger, more is to be appre-

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" hended from the violence and partiality of judges, appointed by
" the crown, in suits between the king and the subject, than in
" disputes between one individual and another, to settle the
" boundaries of private property. Our laws have therefore wisely
" placed this strong and two-fold barrier of a presentment and
" trial by jury, between the liberties of the people and the pre-
" rogatives of the crown. Without this barrier, justices of oyer
" and terminer, named by the crown, as in France or in Turkey,
" might imprison, dispatch or exile any man, who was obnoxious
" to government, by an instant declaration that such was their
" will and pleasure: So that the liberties of England cannot but
" subsist, so long as this palladium remains sacred and inviolate,
" not only from all open attacks, which none will be so hardy as
" to make, but also from all *secret* machinations, which may sap
" and undermine it."

I shall not detain you, gentlemen, by reading any more cases in support of this part of the subject; but I cannot leave this passage from Blackstone without bestowing on it a few remarks. The learned judge grounds his high estimation of trial by jury, on its great security against the courtly disposition of the bench. The judges being nominated by government, selected perhaps for an office, to which their talents and acquirements afforded them no claim; placed there only in conformity to a system of favouritism and party promotion; he apprehends that their gratitude would be in proportion to their own demerits, and they would become obsequious tools of the power that clothes them with authority. The grand barrier against the oppression of the crown, exercised through these convenient organs, is the trial, says he, by jury.

Let it then, I beseech you gentlemen, be preserved inviolate while in your keeping; for in this country it is susceptible of the same abuses. Protect it against all secret machinations, which may " sap and undermine it;" make a noble stand in this momentous cause; where, for the first time, an American jury is attempted to be made the instrument of executive persecution! Frown on the man, who shall have the hardihood to assail this " palladium of American liberty," and render a verdict that shall confer honour on yourselves—serve as an admonition to future administrations, and afford to jurors a bright example, worthy their applause and imitation.

Gentlemen, I have thus, I hope, established my first position to your entire satisfaction; and in a manner not to be moved, I trust, by the great talents and ingenuity opposed to us. I have still, however, to discuss your further rights as connected with this part of the cause; and to show you on what ground your judgments are to be exercised and your verdict given.

You are to render your verdict according to evidence—But what is evidence? It must be that proof of guilt, which shall satis-

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by your judgments. Are you concluded merely by the oaths of witnesses produced before you? If so, innocence may become the prey of falsehood and perjury! Are you limited to conclusions drawn from mere testimony admitted by the court? If so, half of your value is lost—You are no longer a barrier between the arbitrary mandates of a court and the liberty of the citizen. No gentlemen, there is one species of testimony, which no executive can interdict, no rule of law suppress. Testimony, resting in your own knowledge; collected from facts of public notoriety, and acquired from the official documents of our own government; which, like the pages of history are ever to be consulted as evidence of political occurrences. Authorities have already been cited in support of this doctrine: I shall not multiply them, but will refer you to one, as a practical illustration of the principle in a case very parallel to the present.

You have all doubtless heard of the impeachment of Warren Hastings: a trial managed by men of the first rank and abilities, and which provoked the most sublime display of accusing eloquence, ever recorded in the annals of history. It was an accusation preferred by the commons of Great Britain, and the trial was conducted under their immediate auspices. The passions of the community were in'isted, and torrents of abuse daily poured forth in the public prints, against this insulated individual.—Whilst they exaggerated his faults, they teemed with the plaudits of his accusers. At this time a pamphlet appeared, entitled "A View of the principal Charges against Warren Hastings," intending to neutralize popular feeling, and to restore public justice to its even and impartial course. Many of the remarks contained in the work, though essential to its object and intentions, reflected pointedly on the proceedings of the house of commons. It gave a history of the cause and manner of instituting the impeachment. The commons felt their dignity insulted by the publication; and in compliance with their orders, the attorney-general filed an information for a libel against Mr. Stockdale, the bookseller. This, gentlemen, is a brief sketch of the nature of the prosecution against Mr. Stockdale, and will enable you better to comprehend its application to the present case. On the trial, the publication was admitted, and no testimony was offered in court, in favour of the defendant: but Mr. Erskine was his defender, and no man ever better understood the province of a jury. He vindicates his client, on the ground of "remissness of the commons, *who were the prosecutors of the information*," in permitting the charges against Mr. Hastings to become the topic of newspaper disquisition. "Had the commons, therefore," says he, "by their high, necessary, and legal privileges, have kept "the public aloof from all canvass of their proceedings, by an "early punishment of printers, who, without reserve or secrecy, "sent out the charges into the world from a thousand presses in

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" every form of publication; they would have stood upon ground " to-day, from whence no argument of policy or justice could " have removed them." These assertions were not verified by any testimony produced in court, but the jury are told, and legally told, " they have the right to take judicial notice of these " matters, without the proof of them by witnesses; for jurors " may not only without evidence found their verdicts on facts " that are notorious, but upon what they knew privately them- " selves, after revealing it upon oath to one another." Let it not be replied, that this was the argument of counsel, for it received the tacit acquiesence of the judge, Lord Kenyon: than whom a more strict adherer to technical rules, never presided in a court of common law. The jury, faithful to the discharge of their duty, inquire into the motives of Mr. Stockdale, and they are found honourable—They scrutinize the conduct of his accusers—it is considered unjustifiable and unworthy—they refuse to prostitute their judgment to the purposes of persecution—they found their opinions on facts of public notoriety, and they render a verdict of *not guilty*.

Gentlemen, we offered to prove in this cause, by the message of the president, that Spain had commenced war against the United States. The testimony was rejected by the court. This rejection, however, occasioned me no alarm, for I could not believe that you were so ignorant of the political situation of your country, at the time mentioned in the indictment, as not to be already possessed of this ground of our defence. We would, notwithstanding, have preferred, that this article of evidence should have been submitted, as we were desirous it should receive the most scrupulous examination. Indeed, you must have remarked through the whole course of this trial, our solicitude to offer every circumstance, however minute, that was in any wise connected with the transaction. We wished to conceal nothing—to disguise nothing: we early abjured all mystery, and sought only to expose to you the naked truth.

I cannot dismiss the trial of Stockdale, without comparing it with the one now before you, and directing your attention to the prominent features of each. The Commons of Great Britain, one of the branches of its government, by their remissness occasion the offence charged against Mr. Stockdale, and they order his prosecution. The president of the United States countenanced, or at least connived at general Miranda's expedition, and caused the offence to be perpetrated, and he—*even* HE, orders this prosecution! A parallel not less true than disgraceful. Continue it, I beseech you unto the end. Be you, likewise resolved and undaunted in your duty, and the world shall read in your verdict another eulogy on that inestimable privilege, *trial by jury*. I shall trouble you with one more authority connected with this branch of the argument. 1 Trial per pais 532. " The

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" jury may give a verdict without testimony or against testimo-
" mony, when they themselves have cognizance of the fact."

Gentlemen, I have yet one more proposition to maintain, before I consider the law and the fact in this cause; and it is a proposition nearly allied to a correct view of your duty, and your powers. From the mode pursued by the district attorney in conducting this trial, I am authorised to think he will endeavor to confine you to the mere allegations in the indictment, and to persuade you, that you are to deliberate and decide on those facts only, which are *formally* stated on the record. Here again we shall be at issue. There is no such limitation to your inquiries; if there was, you would no longer be judges of the criminality of actions. I shall not trespass upon your time any farther in this part of the cause, excepting only to read this principle accurately stated. " When a bill of indictment is found,
" or an information filed, charging any crime or misdemeanor
" known to the law of England, and the party accused puts him-
" self upon the country, by pleading the general issue, not
" guilty, the jury are *generally* charged with his deliverance
" from that *crime*, and *specially* from the fact or facts, in the
" commission of which, the indictment or information charges
" the crime to consist." In illustration of this principle, I mention the instance of murder, by killing another in a duel—nothing can be clearer than that, according to the decisions of our law books, any man who kills another in a duel is guilty of murder; yet instances are rare indeed where conviction has followed the offence. The facts charged may be proved; but jurors invariably examine into all the circumstances, judge of the crime at large, and, unless unfair practices have been used, acquit the accused or mitigate the offence into a species of homicide not capital—that of manslaughter. I beg I may not be considered as the advocate of the duellist. The manners and customs of the age cannot be admitted as an apology for an offence so dangerous to society, so obnoxious to morality and religion, and oftentimes so fatal to the welfare and happiness of families. I merely give you the law and the practice on this subject, as apt illustrations of the powers belonging to juries. I finish then with remarking, that your verdict is not to be a mere answer to the charges stated in the indictment: even if these charges are proved, you are still to determine whether, under all the circumstances of the case, they constitute crime.

I believe, gentlemen, we are now prepared to enter into the testimony arising out of this cause; having, I trust, fully possessed you of the general principles of law which invest you with your powers. Before I finish my remarks you will perceive, that the applications of these principles embrace the merits of the present prosecution. I shall now state two general questions for your deliberation, when considering the facts legally before you,

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and the law arising on them. First—whether the facts charged in the indictment have been proved—and secondly, if proved, whether the defendant has committed a crime against the statute.

Before I proceed, allow me to remind you that colonel Smith is indicted under a particular statute, and that the evidence must bring the offence expressly within the act, otherwise the indictment is unsupported. The counsel for the prosecution have already occasionally indulged in remarks, tending to evince that the character of this expedition was piratical—"for even admitting," say they, "that war existed between Spain and the "United States, no citizen could carry on a military enterprise, "unless regularly commissioned." This topic of declamation will probably be repeated to you. I call it declamation, for it is inapplicable to the issue. Your inquiries are limited to the 5th section of the act, which has already been read; your field of deliberation is there clearly marked out and defined; nor are you permitted to wander beyond its precincts, for the purposes of conviction. I must also remind you, that this is a penal statute, and is to be strictly construed; and that the defendant must be brought within its very letter. The rule accurately stated declares, "that "penal statutes are to be taken strictly against the defendant, "but are largely and liberally to be expounded in his favour."—This principle of construction is found in all our law books, and is considered as one of the axioms of our law. It is illustrated by many cases in our books of reports: thus in 1 Leach, 123, a man was indicted for stealing a cow, in direct violation of a statute, which made the offence a felony. Fortunately, however, for the culprit, it turned out that the animal had never had a calf, and that circumstance being necessary to constitute it a cow, it was merely what farmers call a heifer. The court declared that the prisoner was not within the letter of the statute.

To prevent the application of the strict rule of construction on this statute, much has been said about its being a declaratory act. Admitting this for the sake of argument, yet a declaratory law, imposing a penalty, is to be construed equally strict with any other penal statute, "*by reason of the penalty.*" If the statute is merely declaratory, the party could have been indicted at common law, of which the statute would have been produced as evidence—the punishment in such case would have been discretionary, and not the statute punishment. But when the public prosecutor seeks to enforce the penalty inflicted by the statute, every rule of construction applicable to the ordinary case of a penal statute, is rigidly to be adopted. Waving, however, all further discussion of these principles, let us attend to the indictment and the evidence given in its support.

The first counts in the indictment are for beginning and setting on foot a military enterprise: sufficient would it be for me to ob-

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serve, that no evidence has been offered to shew clearly who first began or set on foot this enterprise—for on this point not a shadow of doubt must be suffered to rest—the origin of the plan must be incontestibly fixed on colonel Smith, before he can be convicted on these charges in the indictment. 1 Leach, 13, Richardson's case. Two men are indicted for an offence, the proof is satisfactory that one of the two is guilty, but the jury cannot distinguish which—they must acquit them both.

Was this enterprise begun, or set on foot, by the part which colonel Smith took in it, after general Miranda returned from Washington? No—its origin was of a much earlier date: it had been long before conceived by general Miranda: it was the primary object of his visit to the United States, and his intentions were fully imparted to our government. He goes to Washington; his reception there is by no means calculated either to chill his hopes or damp his ardour; on the contrary, it encourages him to commence forthwith his plan of operations. Then, and there, *at the city of Washington*, by Miranda and his accessaries, may the enterprise be fairly considered as begun and set on foot in the United States—so much for this charge. The next in course is, for providing and preparing the means. The means specified in the indictment are thirty men, and three hundred dollars. The money here mentioned was the pay or wages of the men; so that in fact the men and money are connected, constitute the same overt act, and resolve into one point of testimony. Let it be remembered, that there is no evidence showing any agency on the part of colonel Smith in procuring the arms or ammunition.—None proving any connection between him and the persons who purchased those arms. The acts of captain Lewis, Mr. Armstrong, Mr. Ogden and others, have all, by permission of the court, been detailed to you; but I feel too great security in your discernment and discrimination, to fear that such irrelevant testimony can distract your attention, or confound itself with the single charge contained in the indictment, that of *providing men and money*—for we are brought here to answer simply and exclusively to that charge. Mr. Fink is the only witness produced in its support, and he comes in too "*questionable a shape*" to deserve your entire credit. I assert with confidence, that colonel Smith was never guilty of the folly and the falsehood imputed to him by this witness. If you observed the countenance of my client at the time this man was delivering his testimony, you could not fail to read in it the smile of contempt, at his ridiculous absurdities. Among other things, Fink states that he was employed by colonel Smith to enlist men to serve as soldiers—that he actually did enlist them, and that some of them were to be sent to *Washington*. On probing this part of the transaction, it appears that the agreement made with these men, amounts to any thing but an enlistment. It is a special agreement reduced to

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writing and signed by twenty-two persons, acknowledging the receipt of fifteen dollars fifty cents each, for one month's hire, and stipulating, that unless they comply with their engagement the money is to be returned. This writing speaks for itself, and evinces the inaccuracy of Mr. Fink's statement. I challenge the gentlemen opposed to me to point out in this agreement, any enlistment of men for a *military expedition*. Is the engagement absolute in terms, or is it indefinite; depending on the continuance and conclusion of the enterprise? Does it imply the right of enforcing attendance? That right, so essential and peculiar to a military enlistment? that right, which forms a prominent characteristic in a contract of this nature, in contradistinction to one of a common civil nature? No gentlemen; the performance of the engagement is left wholly at the option of one of the contracting parties; the bargain can be dissolved at any time on refunding the money advanced.

Again—supposing this agreement susceptible of the construction given to it by the prosecution, still another question arises; did the men sail under this contract? For it is necessary you should be satisfied that the means were actually used and employed. An agreement to prepare means cannot be in itself the preparation of the means. The agreement must be fulfilled, and in compliance with its stipulations, the means must accompany the expedition. The testimony answers this question, directly in the negative. The men thus hired, go on board the Leander, become dissatisfied with their situation, and return on shore. Rather a mutinous conduct for soldiers! Some of them, and some too who have been examined as witnesses, retain the money advanced to them on the agreement, but absolutely refuse a compliance with its terms; others form a new agreement with Mr. Durning, under which they finally sail in the Leander. Am I not warranted then in saying, that this part of the testimony is inconclusive, and does not establish the offence charged in the indictment?

Conceding, however, the proof to be satisfactory, that colonel Smith did provide and prepare the means for a military expedition, or enterprise; another question occurs—was it a military expedition to be carried on from the United States? For, on this point, the language of the statute is too plain, to permit a mistake in its interpretation. The expedition must be set on foot *within the United States*—the means must be prepared within their jurisdiction, and it must be carried on "*from thence.*" These are the requisites enacted by the statute, as constituting the alleged crime, and unless the evidence fixes each of them clearly upon col. Smith, he is no offender against the *form of the act.*

It is not pretended that col. Smith provided any means for a military expedition, excepting the men engaged by Fink. He had no agency in procuring the arms, ammunition, and other

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warlike equipments, which have been stated by the witnesses. In applying, therefore, the statute to his case, it is only to be considered, as affected by the means charged to have been furnished by him. The question, then, may be fairly put, were these means furnished to a military expedition, to be carried on expressly *from the United States?* I need only recur to the testimony of Rose, (one of the men said to be enlisted) for a satisfactory answer; his evidence, together with the written agreement, allow little room for doubt on this part of the cause.

On arriving at St. Domingo, the men had an option to quit the enterprise and return; new arrangements were there to be made, and such terms and stipulations as are customary in military service, were *there*, for the first time, to be entered into, by the equal free agency of all parties. Can it, therefore, with correctness be alleded, that the men procured by col. Smith, constituted the means of a military expedition, to be carried on *from New-York, against the Caraccas?* The port of St. Domingo was the immediate destination of the Leander, and *from thence* she expected to proceed on the ultimate object of her voyage. Every agreement made with Mr. Fink, in New-York, ceased to operate in St. Domingo: the men were *there* at full liberty either to engage in the enterprise, and involve themselves in the destinies of gen. Miranda, or to return to their native country, free of expense. State this part of the transaction in plain language, and to what does it amount? Col. Smith engages twenty-two men, for thirty-one days, for the purpose of going to St. Domingo: on arriving at that place, they choose to extend their voyage, and enter into an agreement with other persons for that purpose—surely the men formed no part of a military expedition on leaving New-York; they engaged in it at St. Domingo, after their engagements with col. Smith had expired.

Again—this statute is to be strictly construed; the expedition is to proceed *directly* from the United States; *to be carried on from thence.* It is proved, by the testimony of Rose, that on leaving New-York, they were not prepared to carry on a military expedition. It was indispensably necessary to stop at St. Domingo, before they could proceed against the Caraccas. They were not driven to St. Domingo by chance or misfortune; they proceeded thither for the purpose of military equipment, and on gen. Miranda's preparations and arrangements at that place, depended the prosecution of the enterprise. He there accomplishes the contemplated object, and procures the necessary aid—his enterprise, there, for the first time, assumes a military character; and *from thence only* can the expedition be said to be carried on.

To illustrate this part of the argument, I ask you to read the statute, omitting the term "from thence;" its provisions would then be general, and col. Smith might come within its construction. The offence would, in that case, consist *in beginning, or*

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setting on foot, or preparing the means for a military expedition, to be carried on against the territory or domains of any foreign prince or state, with whom the United States were at peace; and it would be immaterial, whether or not, the expedition proceeded immediately from the United States. Such, however, is not the language of the statute. This section of the act was not framed to prevent acts of violence abroad, but to protect neutrality at home. It was not designed to punish American citizens for enlisting under the banners, and mingling in the contests of foreign nations, for other parts of the act provide for such cases; it was merely intended to prevent expeditions from being fitted out, and proceeding directly from this country. The words "*from thence*," therefore, constitute the very essence of the crime for which col. Smith is to answer, and were inserted by congress to define precisely the limits of the offence, created by this section of the act.

I close this part of our defence, by insisting, and in a cause like the present, where the strictest proof ought to be demanded, I am right in insisting, that the charges in the indictment have not been supported by the testimony.

But, gentlemen, this prosecution demands a more extensive range of inquiry. Do not imagine that my client seeks his acquittal on the defective nature of the proofs, or on any nice construction of the statute. He demands a verdict on grounds more elevated and dignified; on principles, that shall satisfy the rectitude of his feelings, and the jealousy of his honour. He expects not a mere negative justification, barely screening him from punishment; but an honourable vindication, that shall exonerate him even from the suspicion of having wantonly infringed the laws of his country; and shall evince, that the punishment of removal from office, so prematurely inflicted upon him, was as unmerited as it was uncandid and precipitate.

I now proceed to the second branch of my argument; whether, admitting col. Smith's agency in fitting out the expedition, he has committed an offence against the statute? A satisfactory reply involves a discussion of the constitutional question, which has already presented itself, under different aspects to the consideration of the court: but whatever may have been its determination, it is not to overrule your judgments. On the contrary, I claim the exercise of your own opinions, founded on your own deliberations, and resulting from your own reflections and discernment, even should they contravene the opinion of the court. The constitution is open to general perusal, nor does it require the sagacity of a judge, to discover its sound construction.

Gentlemen, cannot war exist between the United States and a foreign nation, without a declaration of war by congress? The arguments on this question are nearly exhausted by the repeated discussions it has undergone in your presence. "Congress," says the constitution, "shall have power to declare war." Granted.

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If the nation is at peace, congress can alone change its pacific posture into a state of war. To them, in such case, belongs the exclusive right of deliberating and deciding on a measure, so important to our national interest and welfare. An offensive war, or a war originated by the United States, must be declared by congress; but a defensive war, a war commenced against us by a foreign power, leaves no room for deliberation; there is no election to be made; the nation is no longer at peace, it is *forced* into a war, and the departments of its government are compelled to execute the constitutional duties respectively belonging to them, and incident to a state of war.

How absurd is the contrary doctrine. Does it require the concurrent act of two nations to produce between them a state of war? Spain makes war on the United States; does she retard hostilities until the legislature of her opponent exercises (what in this cause has been urged) her constitutional prerogative? Is war, then, a mere matter of compact and agreement between two nations, requiring the assent of each, before it can go into operation? Preposterous idea! Believe me, gentlemen, this knight-errantry among nations, if it ever did exist, has long since disappeared. They observe not the ceremonious courtesy of the knights of yore, who never entered the list but by sound of signal trumpet, nor engaged in combat until they had mutually exchanged defiance, and placed themselves upon their guard. But to proceed: are the armies of our invaders to march into our territory, to carry sword and desolation into our peaceful dwellings; and shall our executive, whose duty it is to direct the public force for the protection of his country, shall he look on the scene of devastation with philosophic calmness, because war is not declared? Can the constitution be charged with this extreme folly? It cannot be. A state of war between two nations must be consummated by the acts of one, and when hostilities are commenced against the United States, of which it is the duty of the president, in the first instance, to judge, his constitutional military powers are the same as if congress had declared war: *he* may direct the public force, he may authorise private enterprises; in providing for the public safety, he may confine himself to repelling attacks, or he may carry the war into the enemy's encampment seek out the most vulnerable part, and there direct his blow. Such may be his conduct, when the exigency of the case requires prompt and effective measures. But the injury may be of such a nature as only to require a resistance, *strictly* defensive; and the president may, and in most cases, acting prudently, would wait for the sense of congress, before he directs offensive hostilities. In either case, however, he acts from his own judgment, and on his own responsibility. It is made his duty to submit the facts and the consequent proceedings to the consideration of congress as soon as convened. They have the power to correct his errors, if he has

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acted unwisely; to punish his misconduct, if he has acted corruptly. They can arrest the progress of war, by authorising negociations, or extend it by providing more effective means for its prosecution. Their superintending authority is the nation's safeguard, and is the only constitutional check against a wanton abuse of the power reposed in the executive department; a power, I readily admit, fit only to be exercised in cases of emergency and danger; but of the existence of such cases, I repeat, the president must first judge; and while on his own responsibility, he is thus discharging a constitutional function, the citizen who acts under his directions, cannot be considered as a public offender.

The counsel for the prosecution are constrained to admit, that the president may repel aggressions; but they insist, that he cannot pursue active enterprise. Can there be any force in this distinction? The argument stands thus—our public force under the direction of the president, may, in self-defence, destroy the life, but may not restrain the liberty or seize the property of an enemy; as if life was less valuable than liberty or property. The argument must go still further; on our side, life, liberty, property, and every thing is at stake; on the side of the enemy, comparatively nothing. They have only to watch a favourable occasion, invade our territory when we are unprepared for resistance, and return laden with our spoils. There can be no pursuit, because that would exceed the limits of self-defence. There can be no retaliation, however flattering the prospect of success, because that would be offensive war. We must patiently forego advantages which the moment urges us to seize, which may never again present themselves, and meekly submit, until the ensuing meeting of congress, to national degradation and dishonour.

Gentlemen, you can never believe that war, commenced by one nation against another, does not produce an absolute and complete war between both; nor that a formal declaration on the part of the defending nation, must first be made, before its executive can prosecute acts of general hostility, or seize and enjoy all the advantages and acquisitions, incident to the rights of a belligerent power. I now ask, with confidence, who was first to decide, whether or not, Spain had commenced war? To which department of our government did the right belong? The answer must be, *to that department* which is charged with a knowledge of our foreign relations; *to that department* which holds communication with the extreme limits of the union, and to which the high trust is committed of guarding the safety of the whole. There can be but one opinion on this part of the subject. The president of the United States also, is to suppress insurrections; to repel invasions. Before he can do either, he must first determine the fact of their existence—and is not invasion actual war? On those constitutional questions, I behold conviction in all your

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countenances, and any further discussion on my part would be an useless claim of your patience. The ingenuity of my learned opponents, I am confident, cannot pervert your judgments; nor can the weighty decisions, already delivered by the court, govern your opinions, or persuade you to violate self-evident principles. The president did officially declare, that Spain had made war on the United States. With what reason, with what justice then, can *he* support this prosecution, the gist of which is, that a peace subsisted between the two nations, and that it had been violated by col. Smith? If *he* can, this would be a mode of *excusing* presidential errors, as singular as it is cruel and unjust.

I have said the president *officially* declared the fact; it was our desire to lay before you his communications to the last congress. The public prosecutor objected to this testimony, and the court (as we are bound to suppose, for the wisest reasons) sanctioned his objection. You also sought their production: this too was refused, and you are constrained to rely on your own knowledge of their contents. Fortunately for my client, they were promulgated in every newspaper throughout the union; the facts they contained cannot have escaped your recollection, and I need not, therefore, advert particularly to them. I feel no apprehension in appealing to your own knowledge of their purport, and leaving it with you to determine, whether the president did not, in substance, communicate that Spain had waged war against the United States? If not so, why were these public documents withheld from your consideration? Why was the objection made, and the court compelled to pronounce, what it deemed a rule of evidence? Remember, gentlemen—always remember, this prosecution was instituted by order of the *president;* and I need not add, he has cogent reasons for seeking the conviction of my client. Why else did his public prosecutor hesitate to submit the whole truth to your inspection? Why refuse them to your solicitation? Were your minds too weak to comprehend and judge of them; or were you not to be trusted with the truth? Whatever may have been the motive, there was a boldness in this objection, insulting to your integrity and discernment. It was presumptuous to suppose, that thus *blindfolded*, you would, by your verdict, consign to punishment, a meritorious citizen—a soldier of our revolution.

Before I proceed further into the testimony, I will meet an argument, which has frequently been brought forward in the progress of this trial. It has been repeatedly urged that the president could not dispense with a statute of the United States, and therefore his declarations and conduct could in no wise justify the defendant. This argument is plausible, and an answer is the more requisite, since it seems to have fastened itself on the mind of the court. The argument, however, is barely plausible. There is no offence against the statute, unless the enterprise or expedition

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is against a nation "*at peace with the United States:*" and the question always recurs, to which department of government does it belong, to pronounce that a nation has commenced war on the United States? If I am right in ascribing this power to the executive department, and if the president did declare the fact, the provision in the statute becomes, in respect to that nation, inapplicable; and the argument of our opponents is altogether fallacious. Thus, there is a statute of the United States, punishing murder capitally; deliberate homicide is murder—but suppose an insurrection, and the president had declared its existence; that in suppressing it, death should voluntarily be inflicted; would any one seriously contend, that the president dispensed with the statute punishment, because, in determining the state of the nation, he rendered the act innocent, which otherwise would be highly criminal.

I might here, perhaps, with safety rest this defence; but to fulfil the wishes of my client, I must still further task my feeble talents; for he has instructed me to say, that his acquittal must be honourable; that it must result from the most scrupulous examination of every part of the cause; the most severe inquiry into his motives; or it will yield him but little satisfaction. Such is his earnest desire, and I feel myself bound by professional duty to comply with his injunctions. I shall, therefore, proceed to the investigation he so justly claims.

This cause, gentlemen, is doubly interesting, as it implicates the reputation of our executive government, and involves the first principles of criminal justice. The president of the United States, *countenancing* the offence for which colonel Smith was indicted—*the president of the United States*, precipitately removing colonel Smith from office, for the offence so committed—the president of the United States *ordering* this prosecution; and what is still more singular, the president of the United States *interdicting* the attendance of witnesses, essential to the justification of the defendant. In vain do we seek, in judicial records, for a parallel to such conduct. Would to God! for the honour of our country, and its constituted authorities, that this prosecution had never been commenced—that it might pass unnoticed by the recording hand of history, nor form a disgraceful page in the annals of American jurisprudence! Is there a man possessing that independence of thought, which is the prerogative of his nature, whose indignation has not been aroused on considering this prosecution? Party spirit, gentlemen, that fiend, who can blind the sight, and warp the judgment—who too often usurps the seat of justice, and defiles the sacred sanctuary of the law—who can create an idol, and do homage to its follies and its impositions, will not, I am persuaded, influence your deliberations—I feel confident that your virtue is not to be shaken, nor your honest independence undermined by political considerations—you will rise superior to such narrow,

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such selfish restraint—you will protect the hallowed abodes of justice, from pollution—you will demolish the idol, rather than immolate at its shrine, the innocent object of its delusions.

That colonel Smith believed implicitly in the president's approbation of the enterprise; and that he acted upon such conviction, are evident from the circumstances which took place anterior to the sailing of the Leander. The equipment public—the purchasing of arms public—the engagement of men by Mr. Fink public—every thing transacted in open day light: no charge of secrecy—popular curiosity alive, and the actual destination of the Leander conjectured, for weeks before her departure. Surely here is none of the caution and dissimulation, that should characterise the movements of a conscious offender against the laws. Whatever air of reserve might have hung over the undertaking, it evidently originated in laudable considerations. At this time, the war-message of the president was delivered, and congress, at his request, deliberated on his communications, with closed doors—a system of secrecy was judged politic, and the president, in conformity to such policy, enjoined silence on general Miranda. The destination of the Leander, therefore, could not be openly proclaimed without a violation, on the part of Miranda, of an explicit engagement. This also explains the reply of col. Smith to the letter of the collector. It was judged necessary, from an unexpected course of public affairs, that the expedition should be disclaimed by our government. Representations, it is said, were made on the part of Spain, and to satisfy them in some measure, Mr. Gelston is directed to make an inquiry into the affair—he addresses a letter to col. Smith, and the letter and reply are purely official—col. Smith did not feel himself discharged from the honorary stipulations of Miranda—ever faithful to the integrity of his word, he would not betray state secrets. With the letter and the answer, he supposed the inquiry would have ceased; he considered it as made merely for form sake, and that an official answer would enable the president to exculpate the officers of government, and to parry the representations of a diplomatic agent. Little did he imagine that the president, with whom he had lived in former intimacy—whom, amid all the conflicts of party, and the adverse currents of popular opinion, he had "delighted to honour"—little did he imagine that the president, however goaded on by the imperious demands of the ministers of foreign nations, would have sacrificed his friend to an ignoble and time-serving policy—or through an unworthy timidity, would conceal his own errors, by faithless and oppressive measures, against a defenceless individual. How much more generous would have been a public avowal on the part of the president? Would any one have censured him for the spirited measures he had taken? Did he require any justification but the insults and outrages which he himself had pourtrayed as committed by Spain? Oh no—there would then have been a consistency between his declarations and his con-

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duct; a spirited frankness in the one, an independent promptitude in the other, that would have given dignity and decision to his character, and have reflected a beam of lustre on his administration.

Again—colonel Smith was in the enjoyment of a lucrative and honourable office; is it probable that he would voluntarily, and without any consideration have risked its emoluments, by committing an offence, which would have insured his removal?—No, gentlemen, he has not wilfully and knowingly infracted the statute—his mind has perpetrated no crime, for he acted under the conviction, that his proceedings were legally sanctioned by the chief magistrate of the union. WAS SUCH CONVICTION WELL FOUNDED? Did the president of the United States and the secretary of state approve of and countenance this expedition? The man who can doubt it, after hearing this trial must be obstinate indeed in prejudice. He must exclude from his judgment the evidence of truth, and close his ears against its voice, though uttered by an angel tongue. General Miranda brings to this country a letter explaining his whole plan, and detailing his object in visiting the United States. This letter is forwarded to the secretary of state—it precedes the arrival of general Miranda at Washington, and its receipt is acknowledged. The heads of department then are acquainted—*fully acquainted* with general Miranda's projects and his ultimate views—his wish to procure the support of government, or at least its countenance to individual aid and supplies. General Miranda arrives at the city of Washington—is he there received as the outcast of society which he has been stiled by the opposite counsel? Quite the reverse—his reception is highly flattering—official communications ensue between him and the government—his society is courted—his departure retarded by the pressing solicitations of the secretary of state—the topic of his discourse is the emancipation of his oppressed countrymen—the theme is listened to with complacency—policy forbids government publicly to extend an aiding hand, but private or individual assistance, obtained and used with discretion, is patronised and encouraged. Persons in whom he has reposed confidence, are named by him and they are judged to be ably selected for furthering his plans—among the number is col. Smith. Was Spain a friendly nation at this time? If so, the conduct of the president, acquainted as he was with Miranda's plans, is uncommonly reprehensible. An act of hostility is proposed against Spain: the means of effecting it are to be procured in the United States, and the intention of preparing it *here*, is known to the president. Unless he approved of the enterprise, his sense of public duty should have prevented any converse with a man, who meditated by neutral aid, to subvert the government of a friendly nation. If he did not approve, his vigilance should have been unusually alert to discourage and suppress an expedi-

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tion so injurious to the integrity of our neutral character. Above all, our principal sea-ports should not have been permitted as the places of preparation. In which ever light we regard this question, the honour of our chief magistrate appears deeply involved. If he was informed of the measures of Miranda—if he understood their nature and intentions—if he considered their encouragement unauthorised by the wrongs of our country—if he still connived at their prosecution—associated with their contriver—permitted a revolutionary enterprise to be here organised, destined to bear the ravages of war into the bosom of a friendly nation—*If he suffered it to depart unmolested from our ports*—his conduct was in direct violation of that frankness and good faith that should characterise the executive of a neutral nation. On the other hand, if he was informed of the measures of Miranda—if he believed them essential to our national interests—if he accordingly countenanced them at the time, and yet has directed this prosecution—his conduct assumes a tone of pusillanimous policy and selfish duplicity, repugnant to every dictate of private honour—to every sentiment of individual justice. HE WAS INFORMED OF THEM, gentlemen, and we are obliged to construe his deportment in a manner, least dishonourable to our national character. Impatient, as Americans should be, of national reproach, we must maintain, that our government did not wantonly violate its neutral integrity: that when general Miranda enjoyed its confidence, when his enterprise and plans received its patronage and protection, Spain was no longer at peace with the United States. Such too must be your inference, or your verdict will stamp the American character with opprobium—the name of our executive with official dishonour. The motives to this prosecution are personal; the public have not the same interest in it—to him alone must the stigma of it attach.

I am aware, gentlemen, that hitherto I have asserted the knowledge and approbation of the president and secretary of state, merely on the proof afforded us by the confessions of colonel Smith. These confessions were unexpected by our opponents; they ventured too far in attempting to make colonel Smith evidence against himself; they were sensible of their error when too late, and the disclosure was a just punishment for the inquisitorial measures they had adopted. Happily you are thus possessed of the very facts, which his prosecutors studied to suppress—truth becomes triumphant by the very means used to stifle it, and innocence atchieves its victory, through the incautious eagerness of its prosecutors. The confessions of colonel Smith are legal evidence, made so by the examination of the public prosecutor. The rule of law is an acknowledged one; "confessions are to be taken entire:" the attorney general is not to deliver them to you piece meal—he is not to select such parts as may criminate, and suppress such as may justify or excuse.—

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They are legal evidence throughout; if you, gentlemen, believe them true, you are to consider the facts they state, as legally proved.

BELIEVE THEM TRUE—remember they were not tales manufactured for the purpose of evading this prosecution—they were made at a time, when it was neither conceived nor anticipated—they were secrets imparted by colonel Smith in confidence to his friends, in whose safe keeping, he trusted they would repose unviolated. He could not anticipate that they would be ferreted out by a headlong eagerness to convict him. These confessions therefore, bear the convincing stamp of truth, which no ingenuity nor sophistry can obliterate.

BELIEVE THEM TRUE—are they insulated declarations? Or are they not rather corroborated and confirmed by documents and conduct which cannot deceive? Every circumstance which we are permitted to consider, must strengthen our belief—and the industrious efforts to suppress or hide the truth in this cause, have only served to render it more conspicuous. The letter of capt. Duncanson comes as a "messenger of light" to dispel the clouds of doubt and delusion, had any still overshadowed this transaction—let us analyse this letter with some care, for believe me, it is precious testimony—"I understand that something must "be done against the enemies of my adopted country: I this "morning called on Mr. Jefferson." He understands—from whom? The next sentence informs us—he that morning had called on Mr. Jefferson. Change the order of the words and the sense is still the same, though the meaning is more perspicuous. "I this morning called on Mr. Jefferson, I understand &c."—Whatever information, therefore, captain Duncanson possessed on this subject, he evidently collected in his visit to Mr. Jefferson—and he writes immediately, while the impressions he had just received, were still strong on his mind. Why mention that visit to colonel Smith, unless to give him the authentic source whence he derived his information—to evince his knowledge of the secret, and the confidence reposed in him by the president, and to furnish a sure recommendation of his proffered services. To proceed with the letter—"I am at your service if you stand for-"ward." To comprehend the force of this, you will recollect, that general Miranda had solicited the secretary of state to grant colonel Smith a temporary leave of absence from his office. The nature of colonel Smith's employment rendered compliance with this request inexpedient; but it was mentioned, that he might resign his office and enter on the expedition: his predilection for active and honourable enterprise, his superior qualifications for a military rather than a civil employ, pointed him out as a person, peculiarly adapted for the one then proposed, and were the subject of conversation—while, however, his own determination was not known at Washington, the president could only suggest

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to captain Duncanson the probability of colonel Smith's resigning and embarking in the expedition. The import of captain Duncanson's language then is—from conversation, that I have had with Mr. Jefferson I expect that you will "stand forward" in the contemplated affair—in which case I am at your service.

But, gentlemen, the postscript of this letter crowns all, and leaves us "without a loop to hang a doubt on."—"An answer is "asked—you know I ought to have an immediate answer!"—Gentlemen, this letter might be equivocal to any person but colonel Smith; but to him it spoke a volume—and you, in whose hands attending circumstances have placed the key of its mystery, will read in it more, much "more than meets the ear."—The writer who so earnestly requested an immediate answer, was only prevented by caution from explaining his reasons. General Miranda had just left Washington. It was expected there that the expedition would sail very soon after his return to this city. Captain Duncanson, if his offers were accepted, would require some days to arrange his affairs, and prepare himself; he therefore addresses colonel Smith in terms not to be misunderstood by him, "You KNOW I ought to have an immediate answer."—From what trifling causes and circumstances are we frequently enabled to elicit truth, and to expose the most secret artifices!—Gentlemen, can you entertain a doubt that this letter refers to the enterprise, which is the subject of the present indictment; and can you distrust, that captain Duncanson obtained his knowledge of such enterprise, in his visit to the president? You have seen that gentleman in court during the whole of this trial—we brought him here, in hopes to learn from him additional facts to those contained in his letter: but the decision of the court excluded us from his examination. Not so, with the prosecutors: it was fully in their power to have interrogated him, and if I have erred in the meaning which I have given to his letter, the writer might have been his own expositor. We should have exulted to have heard, even at second hand, the details of a presidential conversation. The president's communications with his friend captain Duncanson, may perhaps have been frank and unreserved; we should then have hailed them as "precious confessions." The letter, therefore, and the permitted silence of captain Duncanson, fasten on our minds the truth of colonel Smith's declarations.

BELIEVE THEM TRUE—Where are the witnesses whose testimony would have dissipated every doubt, and dispersed the clouds which have been permitted to obscure these proceedings? Where is Mr. Madison, the *confidential* minister, the favourite *repository* of the sentiments and secrets of the president? Why is he not produced *in your presence* to exculpate his friend and himself, from the stigma of this prosecution? If the confessions of colonel Smith are untrue, their evil tendency cannot be too earnestly averted—For look you, he has not attacked the fair

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fame of these worthy gentlemen by obscure hints and dark innuendoes—He has not played the part of an anonymous libeller, that assasin of reputation—He has boldly, with the frankness of innocence and the intrepidity of truth, preferred his charges, under his own signature, to the legislature of the union. The public prints throughout the United States have circulated his assertions—If false, how slanderous was their nature! With what avidity should the earliest opportunity be seized for their complete refutation! Such an opportunity has occurred—and *such* an opportunity has been neglected. It was but requisite for the witnesses to attend a few days, at the tribunal of public justice—in this hall—before you, *their fellow-citizens*, to testify the truth—and obloquy would no longer have darkened the immaculate departments of these brave and illustrious statesmen:—Whilst their dignity would remain untarnished, and their precious time unwasted, their official characters would have been purified by the ordeal of this very trial, and have shone forth with redoubled lustre. IF THE TRUTH COULD HAVE BORNE THE LIGHT, how urgent, how powerful, how omnipotent were the motives for its exposure.—If the president and secretary had any regard for their private reputations—*the witnesses would have attended*. If they delighted in that honourable popularity, which is the offspring of personal integrity, and public virtue—*the witnesses would have attended*. If they had any of that laudable desire for the esteem of their fellow men, which is the grand incentive to honourable actions—*the witnesses would have attended* There was no motive that governs human conduct, but imperiously required their attendance—*if the truth could have borne the light.* THEY DO NOT ATTEND.— The president prohibits their attendance, and the public prosecutor insists on the trial without their presence.—This, gentlemen, speaks loudly to you in the eloquence of *fact*. No comment, no ingenuity or talents are requisite to press upon your judgments the just and only conclusion. In their wilful absence and obstinate disobedience to the process of this court, we have a volume of testimony; in every line of which, the circumstantial evidence is corroborated, and the declarations of colonel Smith receive "confirmation strong, as proof of holy writ."

Gentlemen, we cannot proceed a step in this cause, but we discover indubitable evidences of colonel Smith's conscious rectitude and self approbation. He dreaded not the examination of his enemies as witnesses against him; on the contrary, he called for their attendance—he spared no expense to obtain it—he procured the process of this court and used every constitutional means to enforce it.—With the proud independence of an honourable man, he sought to establish his innocence by the reluctant confessions of enmity itself! Alas, gentlemen! they could not attend—the president could not dispense with their services at Washington, *even for a few days!*—What! not spare one of them,

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from the highest to the lowest?—No, not one! and had there been a hundred, nay, a thousand more in the service of government, though of the most essential importance to the vindication of my client—believe me, *not one* of them would have been spared at this *mighty pressing* juncture.

But another excuse was attempted. Those official gentlemen, whose presence became suddenly and unusually and unaccountably requisite at Washington in the *month of July*, were denied to the demand of the prosecuted, and withheld from the process of the court; an unqualified refusal would have been too barefaced an opposition to the course of justice, and too palpable an attempt to elude the dreaded investigation. An apology was therefore suggested and practised, adapted to the nature of the case—an artifice, calculated to present the front of candour, as a convenient mask for prevarication. The witnesses were refused to the process of the court, yet they gratuitously offer to testify on interrogatories to be presented to them by a commission.

We are too well aware of the opportunity for evasions which such commissions furnish to persons questioned—we know how easy it is to avoid a frank reply—to explain away, and elude and prevaricate. The acceptance of such answers, would have thrown our client into the power of witnesses, from whom we were desirous to compel reluctant testimony, which, while it exculpated the accused, must implicate the candour and good faith of themselves or their superiors. We were warranted in believing, that the same disposition, the *same influence*, that withheld their persons from the court, would guide their tongues or their pens, in replies to our interrogations. No; we wanted no half-way evidence—no qualified answers—no artful evasions. We were desirous to bring these men in the presence of col. Smith; to trace their connection with gen. Miranda, and his plans, through all its windings; and to let you see their countenances, while you heard their answers—we would have sifted their answers to the bottom: for it must be evident that we seek no concealment; we are only solicitous to expose every fact, and to show how far government did countenance this enterprise—how far they did influence col. Smith in the part he has taken in it. But while I reprobate the expedient, I must admit its policy; since it was of the highest importance to the government to prevent the acquittal of a man, who had already been prejudged and punished to the extent of presidential power. Yes, gentlemen—in the removal of col. Smith from office, we find the punishment preceding the trial, and the judgment and justice of the president fully committed. It became therefore expedient to keep back all testimony essential to the accused—for he must be convicted to justify the premature forfeiture inflicted. It was of the highest and the most material import to withhold any evidence, which might exhibit the government as accessary to the very offence, in the punish-

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ment of which, an over-hasty zeal had already anticipated the sternest sentence of the law. It is not, therefore, matter of extraordinary astonishment, that thus situated, recourse should be had to such an expedient. Pitiful subterfuge! Contemptible evasion! Despicable attempt to impose on our judgments and discernment!—*Is it thus then*, that in the very infancy of our republic, our chief magistrate dares to interrupt the course of justice—*Is it come to this*, that he shall order a state prosecution—urge to trial—press to conviction, and withhold from the accused all proof of his innocence? *Is it come to this*, that he shall jeopardize the character, the property, the liberty of the citizen, by restraining the attendance of his witnesses? *These* are the very features of arbitrary power, which I depicted to you in the opening of this defence—*these* are the insidious approaches of despotism, which you are to check in their first appearance. If they are tacitly endured, the constitution of our country is a dead letter—our boasted rights are vain and unsubstantial shadows. What? Shall every circumstance be heard that can militate against the accused, and nothing be permitted in his vindication or acquittal? Shall the executive, clothed "in a little brief au-"thority," arrogate to himself all power and all infallibility? Shall he be permitted to accumulate injury on injury on the head of a fellow-citizen, and to overwhelm him with reiterated wrongs? Shall the solemn mockery of a trial be played off, where the accused is hurried to the tribunal unprepared—his vindicating testimony denied, and his condemnation urged, in direct violation of the principles of natural justice? "If this be law, which it is for "you this day to decide, the defendant has had no trial! This "hall, built for American justice, is no longer a court, but an "altar—and an *American citizen*, instead of being judged in it by "God and his country, is a victim and a sacrifice."

Gentlemen, I perceive your feelings revolt at the picture presented by this prosecution. You feel indignant at the unworthy attempt to humiliate you into subordinate agents of oppression. You have had an opportunity of investigating in some manner, the circumstances connected with the subject of this trial. In defiance of *open effort* and *covert act*, its true nature has been unveiled before you. Col. Smith, it appears, was willing and ready to assist an enterprise, which had for its object the emancipation of suffering millions—an enterprise which, had it succeeded, would have drawn down the blessings of a rescued nation, and the plaudits of an admiring world. He facilitated it under the *express knowledge*, *unequivocal countenance*, and *implied authority* of government. Had no diplomatic difficulties occurred at home, and no prospects of defeat presented abroad, the honour and glory of the achievement would have been claimed to encircle the presidential brow. But it was soon evident that the minister of Spain had noticed the transaction in all its stages—that he had

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apprised the authority at Caraccas of the intended expedition, in time to prepare them for the attack, and probably to foil its success. Diplomatic representations and diplomatic menaces overawed even our *high spirited* and *undaunted* administration. *Now it was* that the piercing eye of government was suddenly opened, and its anger vented with infuriate valour—upon its own agents!—An admirable finesse to screen its own connivance! Fortunately for col. Smith, the fickle countenance previously given by an unsteady administration, had not inveigled him into any act which contravened existing statutes, or which would support the present indictment.

Gentlemen, I rest the cause with a confidence that has increased in every stage of this discussion. The public have attentively watched its progress—they take a deep and lively interest in your deliberations, and with anxious solicitude await your verdict. Nor is their solicitude more than commensurate with the peculiarity of the circumstances and the importance of the occasion. A case similar with the present in all its various stages, would have been a case of extraordinary hardship in any age, in any country and under any government. How much more extraordinary—how much more oppressive at this enlightened period—in this free country—under an administration flowing "*with the milk of human kindness.*" An individual of respectable character and distinguished services—one who has vindicated the liberties of his country amid all the vicissitudes and hardships of its revolutionary struggle—who marched in the foremost ranks of its army and gallantly fought by the side of its illustrious chief—has had his cause prejudged and a lucrative and honourable office torn from him by the premature exercise of power. The signal of persecution thus sounded, has been faithfully, and strenuously, and mercilessly obeyed. Neither his character, nor his services, nor their own knowledge of his innocence, have had any effect on the vindictive spirit of his persecutors. You have seen him dragged as a culprit to the bar, that the *letter* of the law might be inflicted on him, though the cardinal principles of justice have been violated in every stage of the procedure—that by quirks and quibbles, and judicial formalities—by debarring him from an investigation of the whole truth—by withholding from him testimony, judged essential to his acquittance, a "foul defeat" might be wrought upon him, which should amerce his fortune—stigmatize his reputation and deprive him of personal liberty.

Gentlemen—I will detain you no longer. In your discernment and integrity, I have the most implicit confidence. It is not merely the cause of my client, it is the cause of the community—it is *your* own cause, on which you are to decide. You are about to furnish a precedent, that shall serve as a guiding star, by which future juries shall direct their course—your verdict

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shall be cited in future contests between the citizen and the government; and, according to its nature, shall it serve to protect the jeopardized rights of the one, or to sanction the overbearing encroachments of the other. It is not doomed merely to float in the transient rumour of the day and then to be forgotten—it will be enrolled in the permanent records of history and scrutinized and appreciated by the impartial judgment of posterity. Such, gentlemen, is the momentous nature of this cause—such the awful responsibility of your situation. MAY THE GENIUS OF OUR INDEPENDENCE preside over your deliberations—inspire you with wisdom to discern your duty—with firmness to assert your rights. To your patriotism as citizens—to your honour as men—to your consciences as jurors, I make a solemn appeal. I present my client to you, an upright—an innocent—an honourable man. Such let him be found in your verdict—test his conduct on the strict and immutable principles of justice, and you can never consign him to the *tender mercies of the court*. I feel no apprehension for the event. His property—his character—his liberty are safe in your hands; because you are an *American jury*, and because you love justice and detest persecution.

Emmet. Gentlemen of the jury—I assume it as a fact which cannot be denied, and which is clearly to be inferred from the manner of conducting these proceedings, as well as from the parties who appear against the defendant, that this is emphatically a state prosecution. Impressed with a conviction of that fact, I did not think, at the commencement of this court, that it would have become my duty, during its sitting, to address a jury; for when the defendant came forward and averred upon oath, that he had acted with the knowledge and approbation of the executive; when he threw down the gauntlet of investigation on that point; when he indicated, as the witnesses by whom he meant to prove his assertion, the very heads of departments themselves; when he made the utmost exertions to procure their attendance, and avowed his intention of appealing to their oaths—I confess I believed that the public prosecutor would not have deemed it conducive to the honour of his cause, or the exalted character of the executive government, to urge on the trial of this *state prosecution*, till those witnesses, whose presence we have not been able to procure, and whose absence is attributed, without contradiction, and upon oath, to that very executive, had come in and deposed as to the facts alleged in the defendant's affidavit. I thought that the magnitude of those considerations would have overpowered the littleness of legal discussions; and that this cause would have been postponed by common consent, until it could be brought forward with all its circumstances; and a jury and the world at large enabled to form a correct judgment of the nature and justice of this prosecution. But it has been thought advisable to

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pursue a different line of conduct. We are forced on to trial, without the benefit of our whole means of defence; our witnesses are wilfully absent; our testimony is maimed and mutilated; we are tied and bound, and cast into the furnace; but still we hope that you, like the angel of God, will walk with us through the fire.

You, gentlemen, are taken from the mass of your fellow-citizens; it is therefore natural to apprehend that you may be influenced by those prejudices and misconceptions, which have been disseminated through the community; and it becomes my duty to endeavour to remove them. Against general Miranda, and the object of his expedition, I have heard and read some malignant calumnies, which only could have originated with mean and mercenary beings, who never yet sacrificed a selfish feeling to a public principle; whose hearts never sympathised with the sufferings of a slave; nor swelled with the mighty hope of delivering a nation. The district attorney, in his opening address to you, did not permit himself to adopt those calumnies in their entire extent—he is incapable of doing so, for his sentiments are liberal, and his manners mild. Sufficient, however, fell from him, to give to them somewhat of colour and countenance, and to enlist your passions and prejudices against general Miranda and all concerned in his expediton, among whom he charges the defendant with being one. In particular, I remember, he termed Miranda a fugitive on the face of the earth, and characterised the object of the expedition, as something audacious, novel and dangerous. It has often struck me, gentlemen, as matter of curious observation, how speedily new nations, like new-made nobility and emperors, acquire the cant and jargon of their station. Let me exemplify this observation, by remarking, that here, within the United States, which scarcely thirty years ago were colonies engaged in a bloody struggle, for the purpose of shaking off their dependence on the parent state, the attempt to free a colony from the oppressive yoke of its mother country, is called "audacious, "novel and dangerous." It is true, general Miranda's attempt is daring, and if you will, *audacious*—but wherefore is it novel and dangerous? Because he, a private individual, unaided by the public succour of any state, attempts to liberate South America. Thrasybulus! expeller of the thirty tyrants! restorer of Athenian freedom! wherefore are *you* named with honour in the records of history? Because, while a fugitive and an exile, you collected together a band of brave adventurers, who confided in your integrity and talents—because, without the acknowledged assistance of any state or nation, with no commission but what you derived from patriotism, liberty and justice, you marched with your chosen friends, and overthrew the tyranny of Sparta, in the land that gave you birth—Nor are Argos and Thebes censured for having afforded you refuge, countenance and protection—Nor is Isme-

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nias, then at the head of the Theban government, accused of having departed from the duties of his station, because he obeyed the impulse of benevolence and compassion towards an oppressed people, and gave that private assistance, which he could not publicly avow.

Of general Miranda it is true that he has been a wanderer from court to court, like Hannibal, supplicating assistance for his country. He served in Florida, as your ally, during your revolutionary war; and there, from becoming interested in your contest, from contemplating the prospects that were opened to you by the possession of independence, he first conceived the project of emancipating South America. From your own altar of liberty, he caught the holy flame, which has since inextinguishably burned within his bosom; which has driven him from his home, his family, his social circle and domestic endearments; which has marked and checquered his past life with misery and misfortunes; but which I hope will hereafter make him the illustrious instrument of redeeming from bondage a noble country, highly favoured by nature, but desolated by man—a wretched country, in which the blessings of heaven, wither before the touch of tyranny.

When the armies of France seemed to be the vanguard of liberty in Europe, we find Miranda among her most distinguished generals. From the rulers of that republic he received promises and assurances of assistance for his long meditated project—but alas, gentlemen, the promises and assurances of governors and rulers are only calculated to deceive those who confide in them to their ruin! Spain having made peace with France, asked for the sacrifice of Miranda; and it seems, gentlemen, that when two nations are at peace, if one of them asks from the other for the sacrifice of an individual, the demand is irresistible. Miranda was dragged before a revolutionary tribunal—but that body, composed on somewhat of jury principles, feeling, as I hope every thing partaking of the nature of a jury always will feel, indignation at being made the instrument of such an abomination, loosed and liberated the devoted victim.

From France he passed over into England;

> But to his country turned with ceaseless pain,
> And dragged, at each remove, a length'ning chain.

In England, had general Miranda consented to a transfer of dominion over his country, and to its being subjected to the British crown, he might have arrived to the highest military honours and fortune—but this man, who is accused of being a political intriguer, rejected with disgust the proposals of that intriguing cabinet, and took refuge in America—"the world's best hope."

Here, having soon perceived the clouds which were gathering in our hemisphere, he fondly hoped that the storm would roll towards the Andes, and that the thunder of heaven was at length

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about to burst upon Spanish domination. With what assurances or promises, with what hopes or expectations he left our shores, it is not perhaps permitted to me to assert; but if his object be to give happiness to the wretched, and liberty to the slave, may he fulfil for his country the omen that is contained in his name—A name that surely indicates no common destiny. For in whatever clime the contest is to be carried on; whoever shall be the oppressor of the oppressed—May the Almighty Lord of Hosts strengthen the arms of those that fight for the freedom of their native land! May he guide them in their counsels, assist them in their difficulties, comfort them in their distresses, and give them victory in their battles!

Respecting the character of the defendant, col. Smith, it is surely unnecessary, gentlemen, for me to trouble you with many words. He is an old revolutionary officer, that fought under the eyes, and lived in the family of the illustrious WASHINGTON, whose honourable certificates he bears, as the monuments of his fame. The war for independence, that kindled in him and general Miranda the same love of liberty, by its consequences, connected them in the strictest friendship. It is, therefore, natural to suppose that colonel Smith may have become acquainted with many of the secret wishes and views of Miranda; but for whatever part he may have taken, if in truth he has taken any part in promoting the expedition of which you have heard so much, and whatever may be your verdict, he has already suffered the anticipated punishment of removal from an office, which to an exemplary son, brother, parent, husband and friend, was the sole support of himself and family.

I have thought it necessary, gentlemen, to premise these observations for the purpose of removing any unfavourable impressions, under which you may have hitherto laboured; and also, because I trust they will induce you to scan, with a severer scrutiny, any allegations of criminality in men, whose objects and conduct, even as imputed to them, when judged of on the broad and universal principles of human rights, of morality and justice, and when estimated by their tendency to promote the improvement or happiness of mankind, must appear essentially meritorious and honourable.

It is not, however, gentlemen, exclusively on these broad and universal principles that you are required to decide this cause. The indictment rests on more circumscribed and partial foundations, which, although they will not receive equal respect from the world at large, and will probably never be thought of by posterity, must still be submitted to your peculiar attention. The indictment is framed on a certain statute of the United States, concerning which permit me to make a few preliminary observations. This statute, when first enacted, was merely temporary and for a very short duration. The attorney-general, in his opening, stated

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the present to be the first trial that has taken place on this section of the law, and that it was enacted to prevent certain enterprises set on foot by Mr. Genet, at that time the French minister, in favour of his own government. A somewhat different history of the law has been this day given, by which it would appear that expeditions similar to the present were not within the contemplation of the legislature; it has been stated, and I believe correctly, that this law was made with a view to certain *land expeditions*, then forming under the influence of French counsels, within the boundaries of the United States, against the Floridas—And it must be confessed, that the words of the act most peculiarly and naturally apply to military expeditions or enterprises by land; neither the word *maritime*, nor any other substitute for it, having gained admission into the law. If, however, the attorney-general's statement be correct, and that this temporary statute was directed against M. Genet—let the singular circumstance which marks this trial, be a beacon to warn political men, against the unnecessary making of severe laws, from temporary or party motives: for who would have thought, when this clause was enacted, in the vice-presidency of Mr. Adams, with direct hostility to M. Genet, that the first person who should be tried under it, would be the son-in-law of Mr. Adams—and that the first judge, who should preside on such a trial, would be the brother-in-law of M. Genet! And while I hold up this strange coincidence, as a warning to statesmen against the abuse of temporary power, let it be a caution to you also, gentlemen of the jury, not to be induced by occasional or party feelings, to give to such a law as this, an overstrained or severe construction; for if you do, God knows how soon it may recoil upon yourselves.

We are told, however, that this statute is entitled to peculiar respect, because it is declaratory of the law of nations: and as some sentiments of that kind were expressed by the court, I feel inclined to treat them with the greatest deference. To me, however, I confess it does not appear that this statute has any characteristic of a declaratory law; it is temporary and penal; it fixes penalties not known to the law of nations, and in creating crimes, goes beyond that law; for it punishes the inchoate acts of parties, and almost their very intentions; although the law of nations confines its punishments to actual aggressions. If it were a declaratory law, wherefore should it be limited to a temporary duration? The law of nations is universal and perpetual; the fair exposition of its meaning should be so likewise. I have shown it was not intended to be perpetual; neither is it universal. What civilized state in the world has a statute similar to this? England has acts punishing crimes against the law of nations; but none in its nature or object analogous to this. America did very well without such a law, until a temporary circumstance, in the ebullition

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of party contest, gave it birth: and then congress seemed to feel that in departing from the policy of other states, it was making a dangerous experiment; on no other principle can you account for its having limited the existence of the law to so short a period as two years. Neither is this statute necessary for enforcing the law of nations; that law is part of the common law of England and of the United States, and if any man offend against it, he may be punished, without the intervention of this statute.

The foregoing observation leads me to notice an argument urged yesterday, by the learned judge from Connecticut, who appears at this bar as a counsel for the prosecution. He facetiously jumbled together, the Medes, the Persians, the Elamites, the Syrians, the Egyptians, as the persons employed in Miranda's expedition; and having contended that from their want of commissions, they might, if taken, be executed by Spain as pirates, he necessarily inferred that they were also indictable under this statute. The force of that conclusion does not strike me; for I can easily conceive many cases of piracy, which do not fall within the purview of this law. Suppose congress had actually declared war against Spain; even then the fitting out of a military expedition by private citizens, without a commission from government, would be piracy; but most assuredly it would be no offence against this act. From his argument however, I should draw a very opposite conclusion, and urge to you, gentlemen, that as offences against the law of nations can be punished both at home and abroad without the intervention of this statute; as they are punished in every other country without the existence of any similar statute, you should not be called upon to give to it an extended interpretation, under pretence of enforcing the law of nations; but should, on the contrary, be careful to construe it strictly in favour of the accused; pursuant to the acknowledged principle, that all penal statutes are to be strictly construed.

Before you proceed to a minute examination of the testimony in this cause, while the host of witnesses that were examined, are passing in review before your minds, you must doubtless be struck with the immense chasm that is caused by the absence of those officers of government, and other persons, whose attendance we have fruitlessly endeavoured to procure. Perhaps that very absence renders them more decisive witnesses in our favour. Tacitus, the Roman historian, speaking of the funeral procession of Junia, a noble lady, in which, according to the custom of her country, the images of her ancestors were displayed; but in which, from compliment to the existing government, those of Brutus and Cassius were studiously kept back, remarks that Brutus and Cassius were pre-eminent above the rest, from the very circumstance, that their images were not to be seen. So in the course of this trial, I trust you will feel that the most pre-eminent and important witnesses, those which in this state prosecution

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speak most conclusively to your consciences as honest men, are the heads of departments, and the other gentlemen upon whom we rested that broad defence, by which we were willing to abide and to disclaim any minute or strict constructions of the law.—Now, however, that we are forced to take refuge within those minute and strict constructions, let me entreat you to keep in remembrance, that there is not only no moral guilt in the alleged expedition, with a concern in which we are charged; but that, when judged of by those unchangeable principles which we invoke, it is entitled to universal commendation—let me remind you that we are forced to answer this charge at the present moment under circumstances of very peculiar hardship—let me direct your attention, to those adversaries of every description, which appear marshalled against us—and let me call upon you, gentlemen, appointed as you are to be a bulwark in favour of the virtuous and innocent, to stand for them between prosecution and punishment—let me require you to avail yourselves of that unquestionable right, which in a free country, I hope a jury will always possess, and which in a state prosecution I hope a jury will always exercise, of deciding in criminal cases, both upon the law and fact. Nor will your doing so, in the present instance, impose upon you any very difficult task; for no complicated questions of law can now arise. There is only one principle to be kept in mind, that penal statutes are to be construed strictly, so as to prevent the penalty's being inflicted upon any one, who has not offended against the rigorous construction of the law.—In making that construction gentlemen, you would derive no assistance from an intimacy with legal learning—a correct knowledge of your mother tongue and of the ordinary meaning of the words and phrases used, is amply sufficient. No adjudged cases or precedents can be cited as to the interpretation of this act—no assistance can be derived from the exposition that similar laws may have heretofore received; for no similar law exists in England or elsewhere. The maxim, that penal statutes are to be strictly construed, is indisputable—under the guidance of that polar principle examine the act; apply the evidence to each of its clauses; and I am much mistaken if you do not find yourselves fully competent to form a correct decision, as to the meaning and application of the law, without embarrassment or difficulty.

The attorney general, in his opening address, adopted the arrangement which a perusal of the statute naturally suggests, by examining into the facts, which are to combine together to constitute the crime, in the order in which they are found in the act. My associates have pursued the same course—and it seems to me that you cannot adopt a better method of analysing this law, and of examining whether all the facts that enter into the formation of the offence, be proved, than by considering every member of the sentence separately and in the order of construction. To

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proceed then thus, the defendant cannot be found guilty, unless it be proved to your satisfaction, that *within the territory or jurisdiction of the United States*, he *began*, or *set on foot*, or *provided*, or *prepared the means* of an expedition, which must be proved to be a *military* expedition or enterprise; it must also be proved that such *military* enterprise was to be carried on *from the United States* against the territory or dominions of some foreign prince or state; and it must lastly be proved, that such prince or state was one *with whom the United States were at peace.*

As to the first point, that whatever was done, was done within the territory or jurisdiction of the United States, there is no dispute. But what proof have you that the defendant either begun or set on foot the expedition, whatever it may have been? Colonel Smith, it appears, knew that Miranda had some plan to be put in execution; but the whole course of the testimony goes to prove that he declined being concerned in it, without the approbation of the president—how then can he be said to have begun or set on foot an expedition, which was planned by Miranda, and which the defendant would take no part in till it was laid before and approved of by our executive? Besides, if you examine the facts in chronological order, it will be very apparent that colonel Smith did not begin or set any thing on foot. Captain Lewis and Mr. Armstrong purchased arms, &c. several days before col. Smith is alleged to have done any thing. Amidst the multiplicity of witnesses produced, none of them has said any thing about the defendant's beginning or setting on foot, and Fink is the first and indeed the only one who deposes any thing respecting his providing or preparing the means for the expedition, whatever its nature or object may be: let us therefore, bestow upon him a few moments attention. You will, I trust, agree with me that very little weight is due to his testimony, when you reflect that there was not a person brought here, with whom he had negotiated, who was not made the dupe of his capricious and unauthorised lies. One was to carry the mail, another was to be of the president's guard—and so on. This man having implicated himself in a great mass of criminality, by entrapping the unsuspecting with falsehoods of his own invention, comes here to elude the punishment, which, from his wanton lies, he deserves better than any of the accused, and purges himself by swearing against colonel Smith; but I ask you, gentlemen, is such a man, so circumstanced, to be relied on against such a man as colonel Smith? In order to probe the credibility of this witness, and to expose his motives clearly before you, I asked him, as you may remember, if he was not afraid of a prosecution, and he answered, No—I then asked him why he was not afraid of a prosecution: the answer to that question I was not permitted to obtain. Let me, however, repeat it to you gentlemen, why is that man not afraid of a prosecution? His conduct, as confessed by himself, not only

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lays him open to it; but his aggravated impositions seem to demand it—why then, after so many indictments have been preferred and found on this subject, is he not afraid of the punishment due to his misconduct? Either because he has made an absolute contract for impunity, if he gives important evidence, and then he stands here as an accomplice turned informer, the most odious and questionable witness that can be produced; or if he has made no such contract, he hopes at least, that by fixing the offence on colonel Smith, he can withdraw himself from danger—and feels, therefore, the strongest and most direct interest in attaching the whole weight of culpability on the defendant. The question I proposed, until I was better instructed by the decision of the court, seemed to me to be one of the fairest that could be put on a cross-examination; why any opposition was given to the witness's answering it, I cannot pretend to say: but that kind of protection afforded to an avowed approver, will perhaps assist you in deciding what degree of importance you will attach to his testimony?

I may be mistaken, but it appeared to me, as if there was a design of imputing to the defendant the misrepresentations of Fink as his agent; and that therefore, all the men who had been entrapped, were made to state those misrepresentations over and over again, with the view of rendering the defendant unpopular and of fixing on him a considerable stigma—but let me ask you gentlemen, is there the slightest reason to suppose that he authorised those mistatements? They are abhorrent from his nature and character: and surely it was not necessary that col. Smith should suggest untruths to Fink, in order to assist him in a project of kidnapping. That man's imagination seems to me to furnish sufficient funds, whenever he may think fit to draw on it, for a falsehood. A remarkable instance occurred of the attempt to fix this stigma on colonel Smith in the production of what is facetiously called the muster-roll. The heading of that paper proceeded from the defendant, and after it was gone through, these words "for the president's guard," were significantly read as indorsement—but on further inquiry it turns out that the indorsement is not in colonel Smith's hand-writing, that it was put on after the paper had been given out of his hands, and in short, as I presume, that it is one of the witticisms of Mr. Fink.

This paper, however, is urged as evidence that colonel Smith provided the men named in it, for a military expedition. Before I consider what was the object of the expedition, let me insist upon a fact, which is amply proved by the testimony before you, that the contract made with Fink, as the agent of col. Smith, (even should you believe that suspicious witness) was rescinded by mutual consent; and that after the men were at entire liberty they entered into a new contract with captain Durning, under which they embarked—so that even supposing every thing said respect-

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ing the military nature of the expedition to be true, the defendant did not, in contemplation of law, provide the men who went in the Leander. In every criminal case there is a *locus pœnitentiæ*, and colonel Smith profited by it. By annulling the first contract, he is released from all criminal responsibility—and he cannot be answerable for any new contract entered into by those men with a stranger.

Let us now consider what evidence there is, that this is a *military* expedition. Commerce in arms and ammunition was unrestrained, and vessels allowed to arm themselves as they thought fit, when the Leander sailed for Jacquemel in St. Domingo; with which island, a lucrative and beneficial trade has been for some time carried on. Moreover, all men are at liberty to leave the United States, and whether they are paid for going, or have subscribed their names to a contract, provided it be of a civil nature, the law is not broken. The gentleman that furnished the ship and purchased the cannon, arms and ammunition which were taken out in the Leander, as well as many other merchants, was long in that trade; and now for the first time the military nature of the cargo has been made evidence of a crime. It is fully proved to you, gentlemen, that the Leander sailed bona fide and in fact from this to St. Domingo—and that the persons who went out in that vessel, were to be considered as passengers; and that after they arrived there, they were at liberty, if they thought fit, to return back. What evidence does this furnish of a military expedition's being fitted out from this port; even supposing that at St. Domingo, when the defendant had no longer any connexion with, or controul over it, it may have assumed a military appearance. As between New-York and Jacquemel there is no evidence not perfectly reconcileable with commercial objects—and no further than that port, does the defendant appear to have any concern with providing, or preparing, or setting any thing on foot. The men who went in the Leander, went to St. Domingo as passengers, in a civil capacity—it was not until after their arrival there, that they exchanged their liberty for the submission of soldiers—and until they had consented so to do, men cannot be said, under the strict construction requisite for a penal statute, to have been provided for a military expedition. Therefore, on this point also, the evidence for the prosecution has failed to attach any criminality to colonel Smith.

The next question that presents itself for consideration, taking the statute for our guide, is, supposing you have evidence enough, independent of extrajudicial rumours, to make you say the ultimate object of this expedition is military, yet does it come within the description of a military expedition to be carried on *from the United States* against any foreign prince? In order to make you perceive more clearly the importance of the words "*from thence*," in the statute, I shall follow the example of my learned friend

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who opened our defence, and read the section without those words, "If any person shall, within the territory or jurisdiction of the "United States, begin or set on foot, or provide or prepare the "means for any militai expedition or enterprise, to be carried "on against the territory or dominions of any foreign prince," &c. If this were the law, it would undoubtedly comprehend the preparing and providing within the United States, of the means for a military expedition; even though those means were to be transported from the United States to some other place, and the military expedition to be carried on *from that place*, against the dominions of a foreign prince. Such is our case, if you should think it proved that the expedition was military—and were the law such as I have just read it, you would be forced, as far as relates to this point, to find against the defendant. But the legislature did not think fit to take cognizance of the transportation of warlike preparations from the United States to any other place, even though they were there to be used as the means for carrying on a military expedition against a foreign prince. It confined the penalties of the law to those cases where the military expedition was to be carried on, *immediately, and in the first instance*, from the United States—and therefore inserted the emphatic and restrictive words "*to be carried from thence;*" that is, to sail directly from here against the foreign prince or nation. No such thing was done in the expedition under your consideration; for the Leander sailed with some arms and ammunition, and with some passengers, to St. Domingo. There, and not before, the passengers were, if they chose, to enter military service, and to receive commissions; if they did not choose so to do, they were to have their expenses paid, and passages provided for them back to the United States. At St. Domingo, also, the Leander was to be joined by the Emperor and Indostan, and two schooners; and the whole, when organised into a military expedition, was to proceed *from thence* against the Caraccas. This, however, it is said, is carrying on a military expedition from the United States against the Caraccas, *via St. Domingo*. Let me repeat the question already put by one of my associates; would an insurance on a voyage from New-York to the Caraccas be violated by the vessel's going to St. Domingo? As merchants, you can answer that question. Why should going to St. Domingo affect the insurance? Because it is no longer the voyage insured; a voyage from New-York to the Caraccas must be direct from the one place to the other, and is not the same as a voyage from New-York to the Caraccas, *via* St. Domingo. Remember then, that a penal statute must receive a strict construction, and what would not be a fair and sufficient description in a mercantile instrument, of an enterprise to be carried on from one place to another, cannot be sufficient to satisfy the strictness of a penal law.

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But the force of our reasoning on this point is infinitely strengthened by the circumstance, that the Leander went to Jacquemel, not merely for the purpose of touching there, but to make all the military equipments, (as the very witnesses for the prosecution depose) and to rendezvous with other ships, that were to be jointly concerned in the projected military expedition. Let us test this question, not only by the mercantile language of insurance, but also (as the enterprise is said to be military) by the military acceptation of words. Suppose a commander in chief ordered several detachments from different points, to rendezvous at a particular place, and having made the necessary arrangements, to proceed *from thence* against an enemy's post. Suppose the English minister directed embarkations from Portsmouth, Falmouth, and the Cove of Cork, that they should severally proceed from those places to the island of Barbadoes, and having joined forces there, that they should make a descent upon Caraccas—would it not be an expedition to be carried on from the place of rendezvous, Barbadoes, for instance, and not from any one of the places whence the detachment proceeded? So in our case, the expedition was to be carried on, not from New-York, from whence the Leander sailed, but from Jacquemel, where all the forces were to collect, by previous agreement, and from which the military departure for the Caraccas was to be taken.

Some other considerations place this matter beyond a doubt. It is proved that when the Leander sailed from New-York the arms, &c. were in such bad order that she was in no conditon to undertake any military operations; and it further appears that every person who went on in that vessel, whatever his expected rank might be, went as a voluntary passenger to a friendly island, where he was to be at liberty to stay or return; or, if he preferred doing so, to enter into a military line, to enrol, and if he was an officer, to receive his commission. Surely, then, the friendly island, where the arms were to be put in proper order for military purposes, and where the passengers were to change their condition, and become soldiers, is the place where the expedition is to be considered as assuming a military character; and from that place you must consider it as carried on against the object of attack. The construction and force which I have given to those words, "to be carried on from thence," seem to me unanswerable; and in a case where so many motives should induce you to lean strongly towards an acquittal, you will rejoice at having found a resting place, on which your consciences may repose; and at the opportunity of absolving a man, who is free from moral guilt, and who, at the best, has been most rigorously dealt with.

There is yet another point for your consideration: supposing all the other requisites of the act to be established against the defendant, which is the very reverse of the truth, yet the expedition

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must be carried on against a nation "with whom the United "States are at peace." This topic has already undergone so much discussion, that the force of our observations must have long since been impressed on your minds; I shall therefore be very brief. It is acknowledged that there are two kinds of war, one regularly proclaimed by the governments of two countries, and one actually existing *de facto*, by the hostile conduct of one country against another. So peace, the opposite of war, must be capable of receiving two explanations. Now, keeping in remembrance the maxim I have so often impressed upon your minds, that penal statutes are to be strictly construed, and that every word employed in describing the offence, is to be received in the sense most favourable to the accused, it necessarily follows, that if one of the significations of the word "*peace*," will take the defendant's case out of the statute, that signification must be preferred. It would be sufficient for me to show that in common parlance, and the ordinary intercourse of life, that word is frequently used in the sense for which I contend. But I shall go further, and show that even the congress which passed this law, has, in its legislative acts, employed the word in the same way. For that purpose let me request your attention to an act passed the 27th of March, 1794, chap. 12. entitled "an act to provide a "naval armament," (vol. 3. p. 24.) It begins by reciting that, "*the depredations* committed by the Algerine corsairs on the "commerce of the United States, render it necessary that a naval "force should be provided for its protection." The act declares no war; congress did not exercise its constitutional function of declaring war; no power was even given to the president of making reprisals; but only an authorisation to purchase or provide, and man four ships. The act then concludes, "that *if a peace shall* "*take place* between the United States and the Regency of Al- "giers, no further proceeding shall be had under this act." *If a peace shall take place!* Where was the war, without a declaration by congress? How did it originate? Not in the manner indicated by the constitution; nor in the provisions of that law; but only *in the depredations* committed by the Algerines on the American commerce. Here, then, is a legislative acknowledgment that depredations of that kind may destroy a state of peace; and that congress sometimes use that word in a sense no way opposed to war declared according to the forms of the constitution. Please to observe, too, that this act was passed on the 27th of March, 1794, and that the law, on which the defendant is indicted, was passed on the 5th of June, of that year. We only ask you then to construe the word "*peace*," in the statute of the 5th of June, in the same sense that congress manifestly employed it on the 27th of March preceding—as expressing a state which is destroyed, with respect to any foreign power, by the depredations of that power upon our commerce; and of course by any unwarrantable

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hostile aggressions. But the counsel on the other side say there cannot be war under the terms of the constitution, unless it be declared by congress. Here they entrench themselves; but how do they refute the conclusion which results from the statute I have just alluded to? In truth, it seems to me, that the constitution is very unnecessarily and incorrectly brought into this discussion—and that any inferences from it are perfectly inapplicable. That instrument was formed to prevent the encroachments of one branch of the government upon the others, and of all upon the people; but it had no reference to any thing except the limitation of the powers of the public functionaries. The president undoubtedly cannot, by his own authority, place the country in a state of war; but does it follow from thence, that any other country cannot destroy the state of peace between itself and us by its actual aggressions? That is a thing *de facto*, not depending on the clauses of our constitution; and in that light it was considered by the congress which passed both this law and [illegible] law against the Algerine depredations. Suppose a military expedition had been fitted out by individuals, to be carried on from the United States, against the Algerines, during the existence of that law, would the district attorney have gravely contended, in the face of its last clause, that the Regency of Algiers was at peace with the United States, because congress had not formally declared war against it? The true construction of the statute on which the defendant is indicted, I take to be this—it is meant to go farther than the law of nations, but for whom? For those nations, whose unequivocal amity and friendly dispositions towards us, entitle them to something more advantageous than the bare benefit of the law of nations—those who preserve only a formal peace, while they are inflicting the injuries of war, do not deserve, and shall not enjoy, the privileges which we confer, by our own code, upon sincerely friendly, and therefore favoured states.

This brings us to consider what has been the conduct of Spain towards the United States. The district-attorney admitted that he should be under the necessity of proving, every thing that enters into the statutory description of this offence, and among other things that the United States were at peace with Spain.—In the course of the trial, however, he has offered no proof of that disputable fact; not even by reading the magical words which compose the first article of the treaty of San Lorenzo. I beg leave, therefore, to propose to him this dilemma. Either there is no proof of which you gentlemen, as jurors, can take cognizance, that the United States were at peace with Spain—and of course the defendant must be acquitted: or the state of the two countries, as to peace or war, is a matter on which the jury is warranted to form an opinion, from circumstances of public notoriety—and then, of course, the discussion of those circumstances of public notoriety is open to us; notwithstanding

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the court judged fit to reject, as evidence, the president's message and the public documents, by which we offered to prove the relative state of the two countries. In the absence of proof, on the part of the prosecution, as to the existence of peace, let me state a case by way of hypothesis. Suppose Spain had made encroachments upon our territory—had captured our citizens upon our own boundaries, and had committed depredations on our commerce, such as by inference, constituted the Algerine war, could it be said that we were at peace under circumstances that congress itself declared destroyed peace between the United States and Algiers? Has the testimony for the prosecution proved that a state of things different from this existed, and it should prove every thing necessary for the conviction of the defendant. But it will probably be at present contended on the other side, that you may ground your verdict as to this point, on public notoriety If so, I ask you, is it not publicly notorious, that what I have just now hypothetically laid before you, was in truth, the real conduct of Spain? The district-attorney, in his opening speech, said that this prosecution was to do justice between Spain and the United States—by this statement I think he accurately arranged the parties concerned—and justly placed the United States on the side of the defendant. Spain is the prosecutrix; she has come into your courts, saying she was at peace, while she was making you feel the calamities of war. She asks from you the benefit of one of your own peculiar laws, such as is not to be found in the code of any other nation, which was enacted from internal considerations, and in favour of other states, that observe towards us a conduct unequivocally friendly; and she asks from you this gratuitous favour, as a right, while your territories are yet marked by her unequivocally hostile aggressions. Let her take the benefit of the law of nations against your citizens, as she would be obliged to do against Bristish subjects, if they had pursued a similar conduct. The executive disavows their acts, and leaves the individuals, if taken, without national protection; surely such disavowal and abandonment on the part of our executive is an ample sacrifice to the etiquette of courts. Suppose an indictment on this statute had been framed in the Mississippi territory, against any brave Americans, who, without the orders of government, might have made a military expedition within the Spanish lines to rescue the Kempers. The construction of the law that would be applicable to their case, in that country, is equally applicable to the case of the defendant in New-York. What then, let me ask you, would be the astonishment and indignation of a jury there, if the public prosecutor informed them, that notwithstanding these outrages were unatoned for, and perhaps likely to be repeated, yet it was expedient to sacrifice those gallant adventurers to her resentment. Would they not, by their verdict, teach the government to answer thus, to such an insolent demand

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on the part of Spain? Before you ask the sacrifice of American citizens, restore those you have carried away, abandon our territories, make satisfaction for your depredations on our property and commerce, renounce your hostile plans—and after you have purged away your own offences, should any new injuries be done to you, then you shall enjoy the benefit of all our laws. Let your verdict give government the same instructive lesson; you are the protectors of a fellow citizen against the vindictive oppression of foreign states; you have the power of resisting their insolent demands; you have nothing to do with their vapouring menaces; to them I trust government has already replied, that America adopts Fingal's advice to the son of Ossian—Never seek the battle with the foe—nor shun it when it comes.

I have thus, gentlemen, examined the statute at some length, and given to it a construction, which, if you believe it correct, will undoubtedly entitle the defendant to an acquittal. I shall give you an additional reason why you should believe in the correctness of my construction. General Miranda's expedition was a subject of general conversation in this city some time before it sailed; it was carried on under the eyes of the government, and known to many, whose political communications with Washington city are no doubt accurate and frequent. This circumstance, even exclusive of the inferences that must arise from the non-attendance of the heads of departments, is sufficient to convince you that the expedition was carried on with the knowledge of government. Why then was it not prevented? Most assuredly because the executive saw that it could be carried on, and indeed was carrying on, consistently with the laws of the United States. If it were otherwise, if the expedition were a violation of the law, with such ample time for deliberation and action, would not the president have exercised the power vested in him by the seventh section of this statute, and hindered the sailing of the Leander. To render this argument more striking, let me remind you of the evidence of colonels Swartwout and Platt; by which it irresistibly appears that the defendant had no doubt he was acting with the knowledge of government, and therefore would do nothing intentionally to violate the law. Let me also recal to your memories captain Duncanson's letter, which you have read—From that letter draw your own conclusions, as to the extent of the president's knowledge—but it is certain that captain Duncanson, who resided in Washington, was apprised of the expedition, and informed that colonel Smith would have the disposal of some military commissions. Was he, think you, the only man in Washington to whom those things had been told; or do you believe that the president and the officers of government were ignorant of reports, that had obtained very general currency? His letter is dated the 20th of December last, and the Leander did not sail until the 2d of February. The expedition

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was therefore known at Washington six or seven weeks before it took place, and no effort made to stop it. Surely, then, the president and secretary of state, and other officers of government, considered it as perfectly consistent with our laws. I confess, gentlemen, I attach very great weight to the opinions of those gentlemen—I sincerely esteem and respect them all—Mr. Jefferson I believe to be not only an enlightened patriot and a consummate statesman, but also to comprise in his extensive information, a very accurate knowledge of the law: He had learned, I presume, that the Leander was bound, in the first instance, for Jacquemel; he knew that the transporting of arms, ammunition and military stores to St. Domingo was not prohibited; he knew an American as well as a foreigner might travel—he probably considered, as I do, every person that went in the Leander, as in the eye of the law, only a traveller, till he should assume a military character in a foreign port—he saw that no military expedition was to be carried on from the United States; and he felt that there was nothing in our relations to Spain which could lay claim to the extraordinary exertion of peculiar friendship on the part of the United States; nor any thing in the object of the expedition itself, that could alarm his benevolence or patriotism. This view of the subject does justice to all parties; it marks the wisdom of the president in abstaining from interfering with the expedition; it marks the prudence of the chief by whom it was conducted, and the cautious observance of the law by those who acted under him; and it will mark your discrimination, justice and integrity, if you adopt this construction of the statute, and give a verdict of acquittal.

I could wish, before I conclude, to make another observation. This trial has by some been considered as a party question, and I understand that my conduct in the defence of the gentleman indicted, has been talked of, by the weak and ignorant, as something like a dereliction of my professed political principles. I pity such party-bigots, and have only to assure them, that no feelings such as they possess, shall ever weaken my zeal for my client. But as to my political principles, they are a subject on which I am too proud to parley, or enter into a vindicatory explanation with any man. In me, republicanism is not the result of birth, nor the accidental offspring of family connexions—it is the fruit of feeling and sentiment, of study and reflection, of observation and experience—it is endeared to me by sufferings and misfortunes. I see gentlemen on that jury, between whose political principles and mine, there is not a shade of difference—we agree as to the hands to which we would confide the offices, honours, power and wealth of the republic—I trust we also agree in this, that nothing can be more injurious to the due administration of the law, than that political considerations or party prejudices should be permitted to ascend the bench, or enter into the

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jury-box. That pollution of justice has given rise to many of those abominations and horrors which have disgraced and desolated Europe. I adjure you, do not mingle the spirit of party, with the wholesome medicine of the law; for if you do, most assuredly, sooner or later, *even-handed justice will commend the ingredients of the poisoned chalice, to your own lips.* I intreat you, exercise your prerogatives and discharge your duty in the spirit of uprightness and mercy—do not suffer the defendant to be sacrificed as a sin-offering or a peace-offering; and if he is to be made the scape-goat, on which are to be fixed the faults of others, give him, at least, the privilege of escape.

[Mr. Harison's speech is here omitted.]

Sanford. It has now become my duty to address you on the part of the prosecution. In doing this, perhaps I shall not, in any respect, imitate the example of the counsel for the defendant, who have preceded me. I shall certainly not be so loud; for my lungs would fail in the attempt. I shall certainly not be so long; for, if I should not exhaust my subject, I should, at least, exhaust myself in less time than any one of them has occupied in addressing you. I shall undoubtedly be less eloquent than they; for the arts of eloquence are not mine. I cannot address you with vehemence; for it is not my manner. I shall not invoke God, as they have done; and, I shall not even attempt to move your passions.

I shall address myself solely to your good sense, and shall presume that you sit here under the influence of no other sentiment than an anxious wish to do justice, acccording to law and evidence, between the community and the individual accused.

You have been addressed at great length, by four counsel on the part of the defendant. Each one has treated the subject in his own way, but, in some respects, all have pursued the same course—all have concurred in attempting to excite prejudices in your minds against this prosecution—all have exerted their ingenuity, and exhausted their talents in this attempt. Every topic which might serve to catch a prejudice, enlist a passion, or excite a feeling in favour of the defendant, has been urged upon your attention.

For this purpose, the indictment against colonel Smith has been denounced as a state-prosecution. One of the counsel has declared that he shall take it for a fact, another has said that he takes it for granted, and all have asserted that this is a state-prosecution. The object of affixing this appellation to the present case is obvious. They give it an odious name, in order that you may connect with it all those odious ideas which are connected with state-prosecutions in countries where they really exist. But, gentlemen, you are not to be deluded by the magic of a word, where, too, that word is altogether misapplied. They affirm that this is a state prosecution. I ask, what evidence is before you to show that this is a state-prosecution? There is none. This, then,

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is merely an unsupported declaration made by the counsel, an assertion without proof. But in what sense can this, or any other, be called a state-prosecution in this country? We have derived this expression from the country from which we derived our language; but a state-prosecution, as understood in Europe, cannot exist under the laws of the United States. In the despotic governments of Europe, we know that an individual may be called upon to answer for any offence alleged against him by the prince or his officers. Prosecutions so instituted, where it is in the pleasure of the monarch to accuse, and in his power to condemn, are properly called state-prosecutions, and are justly odious. But our constitution and laws secure us from such arbitrary accusations. The prosecution against Smith, in this instance, is by an indictment found by a grand jury. It is not an accusation presented for trial by the president, or any officer of the government, but it is the solemn act of a grand jury of the country, by which they allege, on their oaths, that a violation of the laws has been committed. It comes before you in the same manner as any other prosecution, for murder, robbery, or any other offence. And there would be as much reason in denouncing an indictment for murder as a state-prosecution, as there is in applying the expression to this case. Surely then, gentlemen, you cannot be misled by the declamation which you have heard concerning state-prosecutions.

For the same purpose, the counsel have appealed to your love of liberty, and have pronounced this a glorious enterprise, intended to give liberty to a great people. They have told you that it deserves your commendation and favour. It is certainly very natural that ideas like these should fall from those of the counsel who have themselves figured in revolutionary scenes, and have in person contributed to erect the fabric of our independence. Undoubtedly, the mere mention of this subject must revive their revolutionary ardour, and excite the recollection of those services which they rendered their country when her own independence was in contest. Surely, it is very natural that such feelings should produce such effusions.

But let me seriously ask you whether this expedition deserves commendation or favour? What are the views of Miranda, this knight-errant of liberty, as he is now represented? Does it appear that he intends to give his country a government more free than that to which it is now subject? Does it appear that the inhabitants of Caraccas are discontented with their present situation, or desirous of the emancipation which is about to be forced upon them? There is no evidence of this. On the contrary, as far as we have evidence on the subject, it appears that this expedition was prepared, not to give liberty to an oppressed people, but to invade the peaceable colonies of a friendly power—to gratify the avarice and ambition of individuals. But the principle upon

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which all this declamation proceeds is unsound, and, in my opinion, deserves detestation rather than applause. According to this principle, we are to become arbiters of systems of government for other countries, and to set on foot expeditions to give liberty to the oppressed. If this expedition, which is to give liberty to a part of South America, be so glorious, it would be equally proper, and doubly glorious, in the view of the counsel, to prepare another against France or Spain, to invade those countries, and to expel the Corsican usurper, as the counsel have been pleased to call the emperor of France. If this be allowable for us, any European nation, having an equal right to relieve the oppressed, might imagine that our government could be changed for the better, and might kindly invade us for the glorious purpose of giving us that liberty which we could not before understand or enjoy. Such a principle would destroy the peace of the world. Under pretence of propagating the true religion, Mahomet and his followers ravaged half the earth. Cortez and Pizarro, when they conquered and pillaged the finest parts of South America, had pretexts as plausible and as just as those of Miranda in this instance. While their professed object was to extend the christian faith, their motives were avarice and ambition, and their real objects plunder and conquest. Their expeditions were as glorious, as honourable, and as much entitled to applause as that of Miranda, which, though three hundred years later, is directed to the same shores, dictated by the same motives, and pursued for the same objects. The visions of glory which have so dazzled the imaginations of some of the counsel will, therefore, be lost upon your good sense and sober judgment.

The adverse counsel have also been pleased to say, that the avowed object of this prosecution is to gratify the government of Spain. This is another assertion without proof. Some expressions which I used in opening the cause to you, have been perverted in support of this assertion. All that I said then, or say now on that subject is, that if our laws have been infringed, and the rights of a foreign nation have been invaded by the same offence, the execution of our own laws must be, in some degree, a reparation to the foreign state. I have not urged or intimated an idea that Smith should be convicted to gratify Spain. He must be tried, and convicted or acquitted according to our own law and the evidence against him.

In the preceding stages of the trial I have said, more than once, that this statute is declaratory of the law of nations. The last counsel has, I think, admitted this, but one of the counsel for the defendant has stoutly denied it. I have before stated to you some reasons in support of the idea that this statute is founded on the law of nations. The same opinion was declared by Judge Paterson in his late charge to the grand jury. In addition to this, I

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shall now read to you some passages from Vattel's Law of Nations, which will establish this point beyond question.

[Mr. Sanford here read from Vattel, pages 223, 249, 252, 634, and 216.

The counsel for the defendant have advanced many propositions which I shall not dispute. They insist, that in a criminal case the jury have a right to determine both the law and the fact, and many hours have been spent in establishing this point. This doctrine we do not deny. We admit that the jury have a right to determine both law and fact; and if we differ at all, it is only in respect to the manner in which this right should be exercised. We contend, that in a criminal, as well as in a civil case, it is the duty of the jury to receive the law as laid down by the court, and to adopt and enforce it, unless they are clearly satisfied that the court has mistaken the law. If such should be the opinion of the jury, they have the power of giving a general verdict against the charge of the court, which cannot be controuled. But the power of rejecting the opinion of the court should be exercised with great caution and hesitation. It is the peculiar province and duty of the court to determine the law. It consists of persons professionally versed in the law, and sworn to lay it down truly. The jury, coming from the community at large, cannot be versed in the science of law. It follows from these considerations, that the jury should receive the law from the court with great respect and deference, and should not disregard it, unless they are perfectly and conscientiously convinced that it is erroneous.

It is also insisted that the jury have a right to take into view notorious facts, and act upon them in the same manner as if evidence of those facts had been given in open court. This position is true in some few cases, but is by no means correct in the extravagant latitude to which the defendant's counsel would carry it. It can only be true when confined to cases in which facts are so notorious and authentic as to preclude the possibility of error. The jury are sworn to give a verdict according to evidence; and the meaning of this obligation is, that they shall decide the cause upon the evidence regularly laid before them under the legal sanction of an oath. The extravagant length to which the adverse counsel have attempted to carry this idea would unsettle the foundations of justice, and destroy the security afforded by the laws. There could not be a more dangerous principle in the administration of justice than that the jury should be at liberty to adopt as proofs rumours and newspaper information, to substitute hearsay for legal evidence, and to overrule evidence regularly given upon oath by the imaginary weight of circumstances not personally known to them, and not disclosed to them under any legal or moral sanction of truth. So dangerous a principle is unknown to our laws. All evidence must be given to a jury upon oath, and

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according to such evidence the jury are bound by their oath to decide.

Having thus attempted to answer some of the general topics which have been urged upon you, I dismiss these preliminary observations, and proceed to the more essential merits of the cause.

Colonel Smith is indicted for the breach of a positive statute of the United States. The charge against him is, that he began, set on foot, and provided the means, in the city of New-York, for a military enterprise, to be carried on against the dominions of Spain in South America. The inquiry for you, therefore, is, whether this charge has been supported by the evidence adduced on the part of the prosecution. Can it be necessary to address you on this subject? Who is there who is not convinced that these facts took place? If there be any one who has heard the mass of testimony now before you, and is not convinced that these things actually took place in point of fact, no evidence which could be offered, and no arguments which I can use, would convince him. If, therefore, I were to pursue the dictates of my own judgment, I should deem it superfluous to address you on this part of the subject. But even this plain part of the subject, depending merely on matter of fact, has not escaped the criticisms and cavils of the counsel for the defendant. It is therefore, perhaps, my duty to examine the testimony, and review some of their objections. I shall attempt to do it.

In the opening of the cause it was stated, that four points were to be established on the part of the prosecution, in order to convict the defendant.

First. That a military expedition, or enterprise, was set on foot in the city of New-York.

Secondly. That this expedition, or enterprise, was intended to be carried on against the dominions of Spain in South America.

Thirdly. That colonel Smith was concerned in preparing this expedition in some of the modes charged in the indictment.

Fourthly. That the United States and Spain were at peace.

Let us examine the evidence applicable to each of these points singly, and inquire whether they are not all most fully established.

First. Was there a military expedition set on foot? If any thing can be established as a fact by the testimony of witnesses, surely this has been done in the present instance. I need not repeat to you their testimony. It is most abundantly proved that an expedition of very considerable magnitude was prepared in this city in January last. The military character of this expedition is equally clear. It is in vain to say, as the counsel for the defendant have said, that perhaps it was for commerce, and not for war. Such a presumption would be against all the evidence in the cause. The preparations which took place possess every characteristic of a military enterprise. A great quantity of arms and equipments of

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different kinds, adapted to different kinds of military service, military stores of various kinds, men enlisted for military service, arranged according to military rules, provided with officers, those officers uniformed, and the whole commanded by General Miranda; all these circumstances furnish decisive and satisfactory evidence of the military nature of the expedition. The false manifest of the cargo of the Leander, exhibited to the custom-house by Lewis, the captain, and sworn to by him, is also evidence to the same effect. No other motive but a consciousness that the enterprise in which they were engaged was unlawful, could have led to the false description in the manifest of the articles of the cargo. The exportation of arms and military stores, for purposes of commerce, was then, and is now lawful. The manifest of the cargo required to be exhibited to the custom-house when a vessel clears out, ought to contain a true statement of the particulars of the cargo, and must be verified by oath; but the clearance which is furnished to the merchant may omit to describe any part of his cargo at his pleasure. Why then should there have been this concealment? If their object was commerce, the laws presented no impediment to their design, and there could not have been a motive for concealment. But if, in truth, the real end of the enterprise was war, a true manifest of the cargo presented at the custom-house, might have frustrated the project; and no other solution can be given to the conduct of the parties in this particular. If, therefore, the expedition had never sailed from New-York, there could not be a doubt that its proper character was military, and not commercial. But if we trace it in its subsequent progress, as now proved to you, this will still more fully appear. The event has established decisively the original character of the enterprise. No mercantile business whatever was transacted at Jacquemel, or elsewhere. No part of the cargo was landed. Nothing was bought or sold. The people of the ship were employed in preparing the arms for use, and Rose, the witness, was engaged in putting handles to the pikes. Miranda was employed in negociating, appointing his officers, procuring two schooners to aid in the enterprise, and printing proclamations. At Aruba the men were landed, a military parade took place, and Miranda reviewed his troops. They proceeded, with a pilot on board, for the declared purpose of landing on the main to commence hostilities. Before this could be effected, an engagement took place with the Spanish vessels, the schooners were captured, and the attempt to land was at that time defeated. With the proof of all these facts before you, can you entertain one doubt, whether this was, or was not, a military enterprise? Surely, gentlemen, I do not deceive myself, when I suppose that your minds must be completely satisfied on this point.

The next point is the destination of the enterprise. Here I might safely rely upon the admissions of the adverse counsel.—

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In the ardor of their attempt to enlist your feelings in favour of the enterprise, they have in effect admitted all that the indictment alleges, or that we contend for upon this point. They have pronounced the enterprise glorious, on account of its object. The avowed object is, in their own words, to emancipate the Spanish colonies, to give liberty to millions of men, and to prostrate the tyranny of Spain. Now, without discussing the propriety of the terms in which they make this admission, this is the very object which we ascribe to the expedition on the part of the prosecution.

But it is not necessary that we should rely upon any admission of our opponents. The destination of the enterprise is proved to you as a matter of fact, beyond contradiction, by testimony which has been given in the cause. The testimony of Rose alone is amply sufficient to show the destination and object of the expedition. It is unnecessary that I should repeat it. In addition to this, is the testimony of Mr. Swartwout, Mr. Ripley, and colonel Platt. They all prove the destination and object of the expedition as stated by the defendant himself, as derived from his own mouth, and this is the strongest evidence against him.—If any thing can be sufficiently proved, this is so proved.

But the counsel say that admitting all this, still the expedition was not to be carried on from the city of New-York—or from the United States, and therefore the case is not within the statute. The military expedition described in the act, is to be carried on *from thence ;* that is, as we agree on both sides, from the United States, where it was prepared. These words, like all the others which describe the offence, must undoubtedly be satisfied according to their true meaning.

The objection of the counsel then is, that the Leander merely took on board the men, arms, and military stores in the city of New York, and proceeded to Jacquemel, and *from thence* carried on the expedition. In a word, the whole objection fairly stated, is, that the expedition was not to be carried on *directly* from the United States. Is it possible gentlemen, that such an evasion can prevail with an enlightened jury ? If I do not misjudge this sophism is much too weak to mislead you.

But let the objection be examined. What is the fair force and meaning of the words *to be carried on from thence ?* Is there any thing in these words to convey the idea that the vessel in which the expedition sails may not touch at an intermediate port ? Does such a circumstance render it less an expedition carried on from the original port ? Certainly not. These words are to be construed together ; and I ask what is the meaning of the words *to be carried on ?* I understand them to mean that the expedition is to be prosecuted, to be proceeded in, to be moved forward and promoted. It cannot be denied that this expedition was to be prosecuted and proceeded in from the city of New-York.—

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An expedition consists of all the preparations which are made for a particular purpose, and if it is to be carried on from one place rather than another, common sense would seem to dictate that it is to be carried on from the place where those preparations are made; for from that place it must first move forward to the place of destination. I might contend, if it were necessary, that an expedition may be set on foot to be carried on from different places successively. An expedition may be set on foot in New-York, to be carried on from thence to Jacquemel, from thence to Aruba, and from thence to the Main, to effect the final object of the expedition. In such a case if it were true that the expedition was to be carried on from Jacquemel, it would not be the less true that it was to be carried on from New-York. If the words *from thence* are to be taken by themselves and considered as indicating merely the place from which the expedition proceeds, then it is carried on from place to place, and from every place from which it proceeds, and the words of the law are fully satisfied. But the good sense and sound construction of these words, as used in the law are, that they refer to that place where the expedition is prepared, where its means are collected and organized, where it assumes the character of an expedition, and from which it first proceeds in that character. It cannot be denied that these preparations had risen to the maturity of an expedition or enterprise when the Leander left New-York. It cannot be denied that the expedition was intended to proceed from New-York to South America, either directly or circuitously. It cannot be denied that the expedition did proceed from New-York, that it did arrive on the coast of South America, at or near the place of its destination, and that when it arrived it was the same expedition which was begun or set on foot in New-York. If these things be so it appears to me a refinement beyond common sense, and the plain meaning of language to say that such an expedition was not set on foot in New-York *to be carried on from thence.*

But our opponents still say that the expedition was not to be carried on from the United States, because when the Leander sailed from New-York the expedition was not in a condition to act efficiently. The guns were not mounted, the pikes were without handles, the muskets had not been furbished and the men were undisciplined. All these circumstances are detailed with great gravity, and the counsel then ask, was this a military expedition to be carried on from New-York? Surely gentlemen it can hardly be necessary to give a serious answer to declamation like this. If it were, it would be enough to say that it is immaterial whether the preparations were great or small, whether the equipments were complete or incomplete, or whether one set of means would not have been better adapted to the object than another. It is enough that an expedition has commenced in the United States. The offence described by the act consists in

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beginning and setting it on foot here. This is the violation of our peace and the offence against the statute. If the preparations made here amounted to an expedition or enterprise described by the act, the offence was complete, and it would not have been altered or diminished if the Leander had sunk before she left the waters of New-York.

The counsel for the defendant have compared this to a case of insurance. They ask if a vessel should be insured from New-York to Caraccas, and should in the course of the voyage deviate from the direct route, and go to Jacquemel whether this would not defeat the insurance? I admit that it would. They then contend that by some analogy this cannot be a voyage from New-York to Caraccas, because the ship touched at Jacquemel. The fallacy of this comparison is evident. Insurance is a precise contract, and the most material ingredient in every insurance is the route or voyage designated in that contract. The insured undertakes on his part that the voyage designated shall be pursued and a deviation from it is a breach of the contract on his part by which the benefit of the insurance is forfeited. Here is no question respecting any contract, and there is therefore no analogy between the cases. A voyage from New-York to Caraccas is not the less a voyage from New-York, because it may have been made circuitously, or because the ship may have touched at intermediate ports in her passage.

Suppose that one of you should project a mercantile expedition from New-York to Calcutta, and should direct the captain of your ship to touch at the Cape of Good Hope to take in refreshments, to obtain intelligence, or for any other purpose whatever. Would not this be a mercantile expedition to be carried on from New-York? Would you not speak of it in the language of this law, as an expedition to be carried on from New-York to Calcutta? Surely it would not be pretended, in such a case, that touching at the Cape of Good Hope, would make that less a voyage or expedition from New-York, which had been originally projected to be carried on, and was actually carried on *from thence*.

If the mere circumstance of performing the voyage, or conducting the expedition circuitously, be a sufficient objection, then this statute may be forever evaded. Any military expedition may be set on foot in the United States and any hostile preparations made against another country with impunity. The perpetrators have only to touch at some other place before they reach the point of their destination, which it may frequently be necessary, and always convenient to do. In this mode they may, according to the present objection, sacrifice the peace of their country, and bid defiance to its laws. This chimerical objection, which exists only in the brain of the counsel who have urged it, must therefore be dismissed as frivolous and unsound.

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The plain meaning of this law is that while the United States are at peace, no person shall be allowed to make preparations in their territories for war against foreign nations. I cannot but feel confident that you will give it effect according to its true sense and spirit.

I proceed to the agency of Smith, the defendant, in this expedition. It is enough if he either began it or set it on foot, or prepared the means as charged in the indictment. Did he begin the expedition? Upon this point his counsel say there is no evidence against him. They ask who began the expedition, and they answer Miranda. This is not so upon the evidence before you.—Miranda conceived the project, and formed the design, but the beginning of the expedition must be something different from the conception of the project. The imaginations of Miranda did not constitute an expedition nor did they begin it in the sense of this law. Our law punishes no man for his thoughts. The beginning of the expedition in the sense of this act is the first overt act performed by any one of those who had embarked in the project for the purpose of carrying it into effect. If this be the true idea of commencing the expedition, then Smith began it. It appears that he took the first and most essential step in the enterprise.—He informed Miranda of a ship proper for his purpose, introduced him to Mr. Ogden, the owner of the Leander, and facilitated the contract for the charter of the ship. This appears to be the first open act in the affair, and is therefore the beginning of the expedition. If this had not happened the expedition might never have taken place. But whatever may be considered the commencement of the expedition, Smith's agency in it may properly be called setting it on foot. It appears that throughout, Smith did every thing in his power to promote it. Colonel Platt states that Smith procured such means as Miranda wanted. His aid in procuring the ship, the enlistment of men by himself and his agents, the payment of money to the men enlisted, and every step taken by colonel Smith in the progress of the affair are all acts of setting on foot the expedition; for they all tended to bring it to maturity, to give it its military character, and promote its ultimate object, and without them it might have been abortive.

The indictment however, presents a more precise charge against colonel Smith. It alleges that he provided as means for this expedition thirty men, and three hundred dollars in money. If I do not exceedingly deceive myself this charge is established by the testimony beyond the possibility of doubt or contradiction. Fink swears positively that he enlisted about twenty men by Smith's direction and as his agent, and his testimony is confirmed by the testimony of several of the men enlisted, and by the muster roll and other papers produced and proved. Doctor Douglass testifies that Smith himself engaged about twelve or fourteen men for the same service. Here, then, is the most sa-

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tisfactory evidence that Smith provided more than thirty men for the expedition. But his counsel say that these could not be men for a military enterprise, that they were unfledged fellows, who had not been drilled, and had never seen service. Really, gentlemen, the counsel must think too well of your good sense to expect to convince or persuade you by observations like these. If the expedition was military in its nature, which I think has been sufficiently proved, and the men were engaged for its service, it is sufficient to constitute the offence. The counsel might as well have told you that the men were too tall or too short for soldiers as to urge such objections.

Another objection is, that the men enlisted had an option to continue in the service or leave it; and this is called a civil contract for service. Be it so, for the sake of argument; and what then? They were still provided by Smith as means for the expedition, and while they were on the land, and at liberty, could not have been provided in any other way than by a voluntary contract on their part. The civil contract, as the gentlemen have called it, therefore, does not help them; for the men engaged by Smith, under that contract, were provided by him for the expedition, in the true sense of the law. Was this the less so, because they had an option to return? I conceive not; for the same answer recurs. They were provided for the expedition, and thereby the offence was complete. An option which might never be exercised could not alter the nature of the offence.

But, in truth, what was this civil contract, and this option to leave the service of the expedition? It was, gentlemen, merely a decoy, a contrivance, to kidnap and entrap these young men and boys on board of the ship, where they were effectually secured and compelled to proceed in her. After they had been allured on board by this artifice they were not permitted to return. This fact appears from the testimony of Rose, who was himself desirous to leave the ship while she lay at Staten-Island, but was not permitted to come away. The bait thrown out was according to the taste of the gudgeon. Some were told that they were to go to Washington to form a guard for the president, and others were to guard the mail; but all were assured that they were enlisted for the service of the United States, and were not to go out of their territories. But after they were on board, and the ship had proceeded to Staten-Island, no one was permitted to leave her; and no more was heard of an option to return. But, say the counsel, they had an opportunity to leave the ship when they landed at Aruba. This was, indeed, a most desirable dilemma; either to remain destitute and friendless on a little island in the ocean, or to reimbark with their comrades, and follow the fortunes of the expedition.

I consider it then established as a fact to your satisfaction, that colonel Smith provided thirty men for this expedition.

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It is also alleged that he provided money for the same purpose. This is proved by Fink, to whom Smith paid three hundred and ten dollars or about that sum as the amount of pay to be advanced to the men enlisted by Fink; and Fink by Smith's direction paid the money to the men. This is proof positive and sufficient that Smith provided three hundred dollars in money for the expedition as charged in the indictment. Even his own counsel have passed over this part of the testimony in silence. It was wise in them not to touch it. It was too tough for them. It could neither be perverted by sophistry nor obscured by eloquence. If there were no other evidence of Smith's agency in the affair, this alone would be sufficient, and must convict him.

Colden. There is a mistake. I contend that the men were not military men, nor was the money applied to military purposes. It was simply to engage them for a passage.

Emmet. I said that the contract which was made by Fink was annulled by another engagement made by Durning.

Sanford. The money was applied to the purposes of the expedition, and to one of its most important purposes, the engagement of men for its service. If the contract had been completely annulled, as is pretended, that circumstance could not alter or affect Smith's offence, if he had committed one by enlisting the men in the first instance. That he did enlist the men is indubitably proved. His offence, then, would still remain complete and undiminished. But what is called the annulling of the contract, appears to be, in fact, nothing more than a change of officers on account of a change of circumstances. The men had been originally enlisted to serve under Smith's son as their captain. He was promoted to the situation of aid-de-camp to Miranda. Durning then succeeded to the command of the company and the men made a new engagement with him as their captain.

The fourth point of inquiry is, whether the United States and Spain were at peace at the time when these facts took place. If they were not at peace, I concede that no offence could be committed against this law. This expedition was prepared in this city in the month of January last, and the question therefore will be, whether the United States and Spain were at peace at that time. To state this as a question, to argue concerning it as a doubtful point, must surely excite astonishment in the minds of all who have heard this trial. If the question were put to any citizen of the United States, to any subject of Spain, or to any well informed man in Europe, whether the United States and Spain were at peace or at war in January last, what would be his answer? Is there any such man who would not answer that they were at peace? I cannot bring myself to believe that you have a doubt upon this point. But still it has been asserted to you with all gravity by the defendant's counsel, that we were not then at peace but were at war with Spain. It may therefore seem to be my

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duty to attempt to answer them. You have already heard much discussion upon this point addressed to the court, and you have also heard its decision. According to the opinion of the court, the United States and Spain were at peace; and this having been decided as a question of law you will probably think it your duty to acquiesce in that decision. If however you should be disposed to examine the grounds of that decision, I trust that you will find them correct and conclusive. We contend, that under our constitution, the legislature alone has the right of making war, and that until they declare war peace exists in the true sense of this law. It is in vain to talk of cases of defensive war or actual hostilities. Any acts of violence by people of different nations may, in a lax sense of the term, be denominated war; but that war which dissolves the obligations of peace and authorises individuals to carry on hostile expeditions against a foreign state, can only take place under our constitution when congress declare it. But without repeating ideas which have been already often urged, I will now meet the counsel, for the sake of argument, on their own ground. Their doctrine is, that the question of peace or war is a question of fact that you have a right to decide it in this case from what they call public documents and notorious facts; and they then assert that in point of fact the United States and Spain were at war. To support this assertion, they refer to the president's message to congress at the commencement of the last session, and the proceedings of certain Spanish officers and troops on the southern frontier of the United States. These show, as they contend, that the Spaniards had invaded our territories and plundered our citizens and they ask with exultation, is not this war. Let it then be fairly examined as a mere question of fact. It is first to be observed that these inroads of which the counsel so feelingly complain, all happened long before this expedition took place. This expedition was prepared here in January last, and the outrages committed by the Spaniards on the southern frontier happened in August, September, and October last. If therefore, their argument prove any thing it proves altogether too much. If we were at war with Spain in January, in consequence of events which had happened some months before, we are at war with her now.

Emmett. *Undoubtedly.*

Colden. We have not taken notice of the message or the documents. The public prosecutor is taking advantage of them. If we had been permitted to give them in evidence that circumstance would have given rise to a variety of observations we had to make; but our right of defence is gone by, it is new matter which the counsel has no right to use. Had we been permitted to speak on that point it is not the case of the Kempers to which we should have confined ourselves. We should have gone to our commerce, to the affairs of St. Domingo and Hispaniola. We should

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have remarked on the case of Flanagan, and a variety of other points which we have not touched.

TALMADGE J. I understand the district attorney as commenting on the documents accompanying the message as matters of notoriety. If he goes beyond that he will be out of order.

Colden. I would have made a different address from the one I did to the jury if I had been permitted to refer to the documents.

Sanford. It is true that the defendant was not allowed to give the message and documents in evidence; but it is equally true that his counsel were permitted to comment upon what they called the notorious facts contained in them without any restriction. I merely follow their example and I think it quite impossible to go beyond it. They insisted that they had a right to comment upon notorious facts, they spoke of the events to which I now allude as notorious, and commented upon them at length and without restriction. I mean, only for the purpose of meeting their own arguments, to consider as notorious what they have themselves considered so, and to pursue them over their own ground.

What then was the state of things which constituted this war in fact with Spain? It is known to all that since the cession of Louisiana to the United States, the boundaries of that country have been a subject of dispute between the two nations. A very considerable tract of country has been claimed by both parties. Spanish officers and troops entered upon this territory claiming it as the dominion of Spain. They there apprehended a miserable set of marauders called the Kempers, claiming them as Spanish subjects, and they probably really were such. This is the invasion of our territories and the seizure of our citizens which has been represented as amounting to war between the two nations. At the very moment when this happens no war is declared by either nation against the other, a treaty of amity and peace between the two countries is subsisting in full force; all the relations of peace and friendship are continued; an extensive commercial intercourse is regularly carried on between the people of the two countries; the public ministers and consuls of the respective nations are fully accredited with each other and exercise their ordinary functions, and our own government, with a full knowledge of the claims of Spain to the disputed territory, and all the aggressions which had been committed, is negociating for the amicable settlement of all differences. Yet we are told that at this time, and in such circumstances, the two nations were at war; that they were at war in January, some months afterwards, and of course that they are at war still. Surely, gentlemen, assertions like these, or arguments, if they can be so called, can neither convince nor mislead you. The conduct of the Spaniards in the south may have been violence or aggression or outrage; but such acts, especially when done as these were, under a claim of

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right, never can amount to war. If it were so nations would be involved in perpetual war. According to this idea the United States have never been at peace with Great Britain. From the treaty of peace in 1783 until 1794 Great Britain occupied a part of our territory, and we have constantly alleged that she harrasses our commerce impresses our seamen and violates our neutral and independent rights. All this, according to the counsel, must be war. Such a doctrine confounds all distinction between war and peace. While men exist acts of violence and outrage will be perpetrated; and the peace of nations would thus be continually sacrificed by the rapacity and crimes of inviduals without leaving to their governments the right of deciding whether or not they amount to a sufficient cause of war.

In vain therefore do the counsel resort to the president's message and the documents and notorious facts of which they have spoken to prove war in fact. They all prove the reverse. The president, in his message to congress in December last, informs them of the injuries received from Spain; that he has avoided measures which might have led to war; that we ought still to hope that time and a more correct estimate of interest and character will produce the justice we expect; that these injuries may, however, render force necessary, and therefore submits it to congress to make such preparations as circumstances may require. Surely if this be evidence of the state of the country, it is evidence that it was at peace. The very question submitted to the decision of congress is in effect whether they would think proper in those circumstances to make war, and the recommendation of the President is to prepare for war as an event which may hereafter become necessary.

Whether therefore this question of peace or war be a question of law or a matter of fact for your decision, it seems undeniably clear that in January last, when this expedition was prepared, the United States and Spain were at peace.

I have thus examined the four essential points which were to be established on the part of the prosecution. I think it can be no presumption in me to suppose that they are all supported by the evidence and established to your entire satisfaction.

It must follow that it will be your duty to convict the defendant unless he has justified his conduct by a legal and sufficient defence. If it be your duty you will discharge it with impartiality and fidelity. The path of justice must be followed whether it may lead to conviction or acquittal.

What then is the defence of colonel Smith? His counsel allege that the president and secretary of state knew and approved of the expedition, and this they say is a sufficient justification. Let this pretence, for I will not call it a defence be examined.— First I ask what is the proof of this assertion? It rests altogether upon the testimony of Mr. Swartwout, colonel Platt and doc-

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tor Douglass. They state that, in the conversations which they had with col. Smith on this subject, he alleged to them that the president and secretary of state knew of Miranda's projects and approved of them. They also state that col. Smith declared that his information respecting the knowledge and approbation of the president and secretary of state was derived entirely from Miranda. Mr. Swartwout and doctor Douglass expressly state this, and though colonel Platt, when he was first examined went further, yet when he afterwards voluntarily came to correct the errors of his first statement, he expressly testified that he understood from Smith that all his information upon this point was derived from Miranda. The whole of the evidence upon this point simply is, that Smith told these witnessess that Miranda told him that the president and secretary of state had a knowledge of his views and approved of his project. Now if this be true, it is difficult to conceive how the knowledge of the executive officers that Miranda entertained a project of effecting a revolution in Caraccas can be supposed to authorise a particular expedition for that purpose which was not projected or commenced until many weeks afterwards. Miranda was in Washington in December, and it was in that month that he gave the information and wrote the letters to Smith which have been mentioned. He returned to New-York in January, and then, for the first time, in conjunction with Smith and others, commenced the preparations for this particular expedition. This plain statement shows most clearly that all that could have been communicated by Miranda to the executive when he was at Washington, if he communicated any thing, must have been his general project of effecting a revolution in Caraccas. It was impossible that he should have said any thing respecting a particular expedition from New-York which was not even projected by himself until he returned to this city and here found men and means adapted to his purpose.

But whatever information may have been given to Smith by Miranda, the temerity and precipitancy of Smith's conduct, even if he believed it, cannot fail to strike you. Colonel Smith, according to his own account, relying solely upon Miranda's information, embarked in a flagrant violation of the laws without inquiring farther. Miranda, an adventurer, a fugitive from his own country, ardently engaged in the pursuit of his favourite project, and interested in the highest degree to remove any impediments which might stand in its way, and for that purpose to deceive those whose scruples might otherwise deter them from aiding him, represents to colonel Smith that the executive has dispensed with the laws of the land in favour of his expedition.—Smith greedily catches at the bait and embarks in the enterprise. This he does too at a time when he holds an important public office under the executive, is in habits of constant communication

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with the public officers, and may at any time in six days ascertain whether Miranda had told him truth or not. These considerations at once show the cunning and duplicity of Miranda, and the culpable negligence of Smith. I cannot persuade myself to believe that you will think the declarations of Miranda, made in such circumstances and for such purposes, sufficient to establish this pretence of the defendant, that the executive assented to this expedition, or to screen him from punishment.

But in order to meet the defendant's counsel fully on their own ground, let it be admitted as a fact for the sake of argument, that this expedition was known to the president and secretary of state, and that they approved of it. This would not amount to an authority to set on foot the expedition, even if the president had power to give such an authority. To know that an offence is meditated, and to approve of the act, are essentially different from giving an authority to perform it. If the president has power to authorise enterprises in violation of our laws, it would seem that something more than knowledge or approbation must be necessary to transfer so important an authority. The counsel for the defendant however say, that they think winking quite sufficient for this purpose. But passing from this point, suppose, if you please, that the president had issued letters patent to colonel Smith, or given him any other formal authority to carry on this expedition. What, gentlemen should be your verdict, upon such a supposition? I affirm to you, and I hope to convince you that colonel Smith would still be guilty of a violation of the law, and must still be convicted. Every one of you knows enough of our constitution and laws to understand this subject. The president has no power whatever to dispense with the laws of the land. The constitution of the United States is a delegation of limited powers, specifically enumerated and accurately defined. The legislative power is vested in congress. The president has only a limited controul over their acts. He alone can neither make nor repeal a law. If he could do so he would be paramount to congress itself, and would absorb in his own person all the powers of the government. The only mode in which he can interfere with the execution of the laws is by the exercise of his constitutional power of pardoning the offender after a conviction for the offence. If this be so it is evident to demonstration that he cannot dispense with a law which has passed through the constitutional forms, and that he cannot authorise an individual to violate its provisions and set its penalties at defiance. Yet the counsel here tell you that the mere knowledge of the president that an offence is about to be committed, and his approbation of the act, is a legal defence, and a valid justification to the offender. I have heard many extravagant ideas and paradoxical propositions advanced in the course of this cause; but this is a principle which is not merely paradoxical or absurd. It is pernicious and dangerous in the extreme. If it were possible that this doctrine

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could be adopted in practice, the constitution would be prostrated and the liberties of the people destroyed. The president would be erected into a monarch with supreme power, and the acts of the legislature would be the sport of his pleasure. The counsel call upon you to stand between the executive and the defendant, whom they describe as his victim. I call upon you in turn to stand between that executive and the offender, who has flagrantly violated the laws, and relies upon the assent of the executive to the act as his defence. If as the counsel suppose, and as I cannot doubt, you feel a sincere attachment to the constitution, and that jealous spirit of liberty which is ever ready to resist the encroachments of power, it is here they should be exerted. It is the defence, gentlemen, and not the prosecution, which should be the subject of your jealousy as freemen, and inspire you with a spirit of opposition and resistance. If the president has intended to shield the offender from the punishment of the law by an unconstitutional attempt to dispense with its provisions, will you, a jury of the country, give effect to such an attempt? This is the executive influence which should be resisted, not by giving it effect in acquitting the defendant, but by enforcing those laws which, while unrepealed by the legislature, cannot under any pretence of authority whatever, be violated with impunity. Surely you will never give your sanction to a doctrine so enormous, so dangerous and fatal to our liberties as that which is urged upon you by this sort of defence.

But the counsel for the defendant still urge, that his intentions were innocent; that he really thought that the president could authorise individuals to set on foot military expeditions; and that therefore he ought not to be punished. This is taking for granted what has not been proved, and giving Smith credit for sincerity of which there is no evidence. But if it were so, still Smith was bound to know the law, which indeed this observation seems to admit, and he was equally bound to know that the president had no power to give him absolution from its penalties. If therefore, he in fact had the consent of the president, he knew or was bound to know, that it could not avail or protect him. There is no analogy between this and a variety of cases which have been put, where offences consist essentially in a felonious intention, or are committed from mistake in relation to facts. Here the error of colonel Smith, if he erred, but of which there is not and cannot be any evidence, was an error of opinion, a misapprehension of the law. This is a defence which the law never allows, and it is obvious that if it could prevail criminal justice must be forever defeated.

If all this should be insufficient to screen the defendant, his counsel then appeal to your compassion. It would be hard indeed they tell you, that a man should be punished who has been seduced into his offence by the highest officers of the government. I have already urged to you that there is no proof on this subject which you ought to regard; but supposing it to be a fact, I trust

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you are convinced that it ought not to enter into the scales of justice upon this occasion. If the president and secretary of state, have committed offences, let them be accused and punished.—They are not only answerable to all the laws of the land, but are also liable to impeachment and punishment for any official misconduct. It is a maxim in morals and equally a principle of law, that the crime of one man is neither justified nor extenuated by the offence of another. If the president and secretary of state, and colonel Smith have been accomplices together in any criminal transaction, let each one be punished, and let no one escape for so absurd a reason as that the others were accomplices in his guilt.

But if it were possible that this pretence of the assent of the executive, and the innocence of Smith's intentions, could avail him for any purpose whatever, it could only be considered as mitigating his offence. It cannot therefore enter into your present inquiry, which simply is whether the defendant is guilty or not guilty. When he shall be convicted by your verdict, the degree of his guilt must be determined by the court. The ultimate limits of the punishment are fixed by law, and it is the province of the court to determine according to all the circumstances of the case what punishment is proper, within those limits. This and every other consideration which may serve to mitigate the punishment of the offence will then undoubtedly receive just weight and attention.

Where then is the pretended defence of colonel Smith? It will not bear the test of sober reasoning and the touchstone of the constitution. It is addressed to your passions and not to your judgment. It must be dismissed as fallacious and unsound.

Let me then take a rapid view of the case which now stands before you for your verdict.

In the month of January last, the United States and Spain were at peace, and all the relations of amity, and the usual intercourse of commerce, subsisted between the two countries. A military expedition, comprising extensive preparations for war was at that time projected and prepared, in the city of New-York, against the colonies of Spain. The defendant, colonel Smith, engaged in this expedition from its commencement, procured some of the most essential means for the enterprise, and provided money and enlisted men for its service. This expedition actually proceeded from New-York to South America, for the purpose of invading the Spanish colonies, and wresting them by force from the dominion of Spain. Such, gentlemen, is a plain statement of the case upon which you are to decide. Is not this an offence? a high and most dangerous offence? Is it not the very offence described in the law before you? Certainly, gentlemen, you must answer these questions affirmatively. Yet you are called upon to acquit the defendant. What opinion would the people of the

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United States and the world entertain of such an acquittal, in such a case. If you acquit the defendant, you say to the world that the United States no longer rank with the civilized nations of the earth; that they have renounced the law of nations; that they permit their citizens not only to violate their own laws with impunity but to invade the people of other countries with hostile force, in a time of peace, as avarice, ambition, or the thirst of plunder may dictate. Such a decision would justify the acts of the pirate on the ocean, and would sink our national character to the barbarism of savage tribes. I need not repeat to you the consequences to which this offence may yet lead. The government of Spain may undoubtedly consider it a justifiable cause of war, and the nation may yet expiate with its blood the crimes of its citizens. It is now submitted to you either to give your sanction to this offence and to such principles, and acquit, or to enforce the laws, and convict. I trust in God and in your intelligence and integrity that you will pronounce the offender guilty.

[Mr. Edwards' speech is here omitted.]

Talmadge J. Gentlemen, the trial upon this indictment has already occupied several days of your time. It is now drawing to a close. You have listened to the testimony of the witnesses and have attended to the argument of counsel. If in some instances the latter has been more at length than clear and illustrative, in others it has been ingenious and eloquent.

This is a cause of considerable expectation and importance, both as it regards the individual accused, and as it relates to that system of neutral policy which hitherto our government have invariably pursued, and from which the United States, in a great measure derived, and are to expect, prosperity and happiness.—Conviction may not only subject the defendant to fine, but the loss of personal liberty; and should our government permit offences of this nature by passing them over with impunity, war and a participation in the quarrels and bloodshed of Europe must necessarily ensue. Need I say that such consequences ought especially to induce a jury to the most careful and dispassionate consideration of the evidence, and bear them superior to any prejudice which idle report, or out-door observation, may have excited. You will now give your attention to a review of this subject. It shall be my endeavour to present it in its native state stripped of embellishment. It is my duty to state to you the law, the substance of the accusation, and the defence.

You have heard much said upon the right of a jury to judge of the law as well as the fact. Be assured, that on this occasion there is not the least desire to abridge those rights. I am an advocate for the independence of the jury. It is the basis of civil liberty, and in this country I trust will ever be a sacred bulwark against oppression and encroachment upon political freedom. The law is now settled that this right appertains to a jury in all criminal cases. They unquestionably may determine up-

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on all the circumstances if they will take the responsibility and hazard of judging incorrectly upon questions of mere law. But the jury is not therefore above the law. In exercising this right they attach to themselves the character of judges, and as such are as much bound by the rules of legal decision as those who preside upon the bench.

It was delivered as the opinion of this court by the judge who presided at the commencement of the term, and it is still my opinion that the U. States were at peace with Spain at the time the defendant is charged with the offence in the indictment. It was also the opinion of the court, and no subsequent argument has changed my view of the subject, that the previous knowledge or approbation of the president to the illegal acts of a citizen can afford him no justification for the breach of a constitutional law.—The president's duty is faithfully to execute the laws, and he has no such dispensing power.

These points have received the decision of the court seriatim, and I trust a jury will not set up a contrary opinion but with great circumspection and deference to the learned judge who delivered them, the necessity of whose absence is a subject of regret, and whose opportunity for correct legal decision is obviously so far superior to what falls to the common lot of jurors.—Should you however choose not to confide in the correctness of the court in this respect, the data exhibited, and which will lead to your determination of these points, are a view of the constitution and laws of congress giving and defining the power of making war; the powers and duty of the executive branch of the government—the statute upon which the indictment is preferred, and the treaty of San Lorenzo, 1795, which stipulates "that "there shall be a firm and inviolate peace and sincere friendship "between his Catholic Majesty and the United States." You have no document, nor any proof before you, establishing a state of things contrary to the stipulations of the treaty I have now read.—Certain papers have been offered in evidence, which, it is said, acknowledge aggressions by Spanish subjects, and evince a state of war in fact between the United States and the king of Spain.—By authority of the former decisions, those were decided irrelevant and rejected as improper evidence. The United States cannot be constitutionally at war, but when war is authorised by congress, or is rendered an act of necessity by the invasion of a foreign enemy. Principles of self defence in such case point it out as the duty of the chief magistrate of the nation in the interim of congress to repel force by force.

The greatest scope of the jury is to determine upon points arising upon the pleadings and such evidence as is permitted to come before them. It is the exclusive province of the court to determine upon the admissibility of evidence. That which their judgment rejects as improper, the jury have no right to presume.

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The contents of those papers is unknown, and conjecture can never afford safe ground for the decision of a jury, sworn to determine truly. Our living at peace is what constitutes the offence. For although the defendant was concerned in setting on foot, or preparing the means for a military expedition against the Spanish dominions, if the United States were at that time at war with Spain, he would be innocent, and should you so determine, you will acquit the defendant upon his indictment.

The indictment against William S. Smith, contains counts, charging him with offences prohibited by an act of congress of June, 1794. The fifth section of that act reads as follows: "that "if any person shall, within the territory or jurisprudence of the "United States, begin or set on foot, or provide, or prepare the "means of any military expedition or enterprise, to be carried "on from thence, against the territory or dominion of any foreign "prince or state, with whom the United States are at peace, "every such person, so offending, shall, upon conviction, be ad- "judged of a high misdemeanour," &c. It is the peculiar province of the jury to inquire, whether the evidence adduced maintains the charges in the indictment. If it fully supports any one of them, it will be your duty to find him guilty. The proofs in relation to the matters of fact, charged in the indictment, have very properly been divided, into that which regards the setting on foot, providing or preparing the means within the United States, for an expedition or enterprise to be carried on from thence—that which regards the object, and that which manifests the defendant's participation and agency in setting on foot and preparing the means for such expedition or enterprise.

A summary of the testamony of the many witnesses who have been examined to prove the first point is, that the Leander, a merchant vessel, owned by Samuel G. Ogden of this city, and for some time previously used in the St. Domingo trade, had just returned from a voyage from that island, when she was chartered to take out Gen. Miranda and such persons as should choose to go along with him. The vessel immediately underwent repair and alteration suitable to the particular purpose; having a new lower deck built in her hold. She cleared out at the custom-house on the 23d January, and sailed from this port on the 2d February last—had a very crowded cargo, and was laden almost entirely with articles of warlike preparation. From 180 to 200 men were here engaged in the enterprise, several of them immediately after took military title and rank, and all were submitting to subordination and discipline. Eleven or twelve hundred suits of soldiers' uniform—about six hundred swords and cutlasses, and a great number of belts, pouches and cartridge boxes—about four thousand five hundred pikes—a number of muskets, horsemen's pistols and blunderbusses, all of which were principally in boxes or casks. Exclusive of her complement of

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seventeen guns, the Leander had on board about thirty-four cannon, with several field carriages—one hundred and fifty casks of gun powder, and a quantity of ball suited to cannon and muskets of different caliber. These articles were chiefly purchased by the captain of the vessel, Armstrong, upon the credit of Mr. Ogden, and sent on board with a view to the enterprise. The object was either military or commercial. Miranda was at the head of the expedition, who for twenty years has made no secret that his wishes and intentions were inimical to the duration of the Spanish government in South America. His declarations to Mr. Ripley, to Col. Platt and Swartwout, avow his design of returning to his native country, the province of Caraccas; to revolutionize it, and to free his countrymen from what he terms the yoke of Spanish oppression. Allurements, military honours and rapid fortune, were held in view to induce men to enter upon an enterprise, secret and unexplained, while written assurances were given that the *service* should neither be against the French nor English.

The testimony of Mr. Rose, who went out in the Leander from this city, and remained on board until the capture of the two schooners, and Miranda's return with the Leander to Barbadoes, will more clearly than that of any of the other witnesses, enable you to determine whether the original intention of the preparation and outfit of the Leander was for a military expedition, or mere commercial enterprise. The witness swears, that soon after the vessel left the Hook, he with several others were industriously employed in making handles to the pikes, and putting the arms on board into complete readiness for actual service. That the vessel first touched at Jacquemel, but did not there unload any of her cargo, or transact business of a commercial nature, and only remained to recruit a few men and equip the two schooners, to accompany and support the Leander in the enterprise, out of the supplies she brought from New-York.

While at Jacquemel Miranda issued commissions to those who took military rank and office, before the Leander left this city. From St. Domingo this squadron proceeded to Aruba on the road to the Caraccas, when the men were all landed and underwent military parade and inspection, and here first were made acquainted with the particular destination. The hostile landing of a military force, and the distribution upon the Main, of proclamations in the Spanish language, headed by Miranda's name, as general and commander in chief, next are attempted off Porto Cabello by the very men who were engaged in this city, armed and equipped with the very preparations provided and carried from here. These attempts are opposed by Spanish government vessels; an engagement ensues; the invaders are beaten off, with the loss of the two schooners and many of the men.—

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The Leander returns alone, taking the course to Trinidad, but falling in with an English sloop of war the Lilly, with her went into Barbadoes.

The counsel for the defendant urge this to be a mere commercial enterprise, from the facts, that the vessel had been previously occupied in the West-India trade; that the articles composing her cargo, were those of ordinary commerce, the open manner they were purchased and put on board, and that the Leander was not in complete condition and readiness to carry on a military enterprise at any time, while she remained within the United States. I think there is some reason to doubt the correctness of this position, and to suspect that the 1200 suits of soldiers' uniform, the regimental coats, the cannon drills, the chest of armourer's tools, and the case of surgeon's instruments, not to be paid for unless the expedition should be successful, were not intended as articles of commerce.

It is not necessary that the expedition should be consummated without deviation of course. Was it begun, and were the means prepared to be carried on from the United States? The words of the statute are, "if any person within the territory or jurisdiction of "the United States, shall provide or prepare the means of a mili- "tary expedition, to be carried on from thence;" therefore, it matters not whether or no, the vessel, at the identical time of sailing, is in complete readiness for hostile engagement. You are not to inquire of her capacity to atchieve the object. If, in fact, the Leander sailed with the intent, and means to carry on such an enterprise, I conceive the transaction comes within the prohibition of the act. But the facts in evidence is the proper business for your determination. In the case I mentioned yesterday, under this very act, for a similar offence, tried April, 1795. Paterson, justice, charged the jury, "that converting a merchantship into a vessel of war, must be deemed an original outfit; for the act would otherwise become nugatory and inoperative.—It is the conversion from the peaceable use to a warlike purpose, that constitutes the offence.

The vessel in question, arrived in this port with a cargo of coffee and sugar from the West-Indies, and appears to have been employed by her owner with a view to merchandize, and not with a view to war. The inquiry is, therefore, united to this consideration, whether, after her arrival, she was fitted out in order to cruise against a foreign nation, being at peace with the United States. It is true, she left the wharf with only four guns, but it is equally true, that when she dropped to some distance below, she took on board three or four guns more, a number of muskets, water-casks, &c. and it is manifest other guns were ready to be sent to her by the pilot-boat. These circumstances clearly prove a conversion from the original commercial design of the vessel, to a design of cruising against the enemies of France,

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and of course against a nation at peace with the United States, since the United States are at peace with all the world. Nor can it be reasonably contended, that the articles thus put on board were articles of merchandize, for if that had been the case, they would have been mentioned in the manifest, on clearing out of the port, whereas it is expressly stated that she sailed in ballast. If they were not to be used for merchandize, the inference is inevitable, that they were to be used for war. No man would proclaim on the house top that he intended to fit a privateer.— The intention must be collected from all the circumstances of the transaction.

It now only remains to consider how far the defendant was concerned in beginning providing and preparing the means of the expedition. Col. Smith mentioned to doct. Douglass, before Miranda arrived in the United States from England, that he had expected that a grand expedition was on foot and that his son was going. After Miranda did arrive the defendant introduced him, first to Mr. Lewis, one of Ogden's captains, then to Mr. Ogden, as persons likely to aid him with a vessel proper for his purpose. He employed the witness, Fink, to engage a sergeant, corporal, and twelve men for military service. The testimony of Mr. Fink appears to be candid and I think entitled to belief; but he is an old inhabitant of the city and you know his character. He swears he saw col. Smith write the papers which contain the terms of the enlistment and promise of bounty lands. The defendant paid a month's wages to the witness to be advanced to each of the men so engaged, tied up and marked with the name of each man; and although there appears to have been among them some hesitancy about the propriety of their engagement, the men afterwards all declared themselves satisfied, and finally went upon this very advance of bounty. The verbal declarations and assurances of the defendant to the witness may be considered delusory and purposely intended to misguide and cover from the men the real object of their engagement, yet those clearly manifest the agency and participation of the defendant in providing the means for the entreprise. That these means were so provided and prepared by the knowledge and approbation of the president and secretary, you have already the opinion of the court, can afford the defendant no justification in the breach of positive law, however far the fact, if so, may operate to produce a pardon from the executive. But the testimony relied upon as establishing this fact is by no means positive or entitled to implicit confidence. It is the declaration of Miranda alone which charges the administration with previous information of the expedition; whose scanty means afforded him abundant reason to mask his real feebleness with any pretensions, the best calculated to facilitate the accomplishment of his views. The deliberate declarations of a party are indeed

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the strongest evidence against him. In the present instance these may induce a belief that the defendant was deceived in this respect by the equivocal or false representations of Miranda, but never can justify him in the illegal act charged in the indictment.

This is the state of the case before you. It is not a question of party politics. The people of the United States of all denominations are equally interested; and I have too much respect for the character of an American jury to anticipate a determination upon such grounds. The undertaking may of itself be a great and glorious one, worthy the breast of a good man, glowing with desire for the universal emancipation of those oppressed by the weight of monarchical power; nevertheless, an upright and dignified course of conduct, a harmonious intercourse with foreign nations is worthy the attention, is the duty of our government to cultivate and maintain. The laws must be observed and enforced. Sympathy ought not to cloud the conception nor warp the judgment of a jury whose duty simply is to pronounce truly upon the facts in evidence. The attribute of mercy is in other hands, and no doubt will be discreetly exercised.

Harison. I wish to correct a mistake which I think the court have fallen into, who has said to the jury that the confessions of the party are not to go in justification. His confessions, whether in crimination or justification, are to be taken together. The law is laid down in trials per Pais, 298.

TALMADGE, J. I mean to be understood that the confessions of the party must be viewed entire, not in detached parts; the purport and meaning of the declaration must be collected from a view of the whole conversation at the time. You will not convict the defendant but upon clear and satisfactory evidence of his guilt, nor acquit him against evidence, because he has declared himself innocent.

Colden. I humbly conceive that the confessions of a party, made at one and the same time, are not to be taken, stronger as they are against him, than as they are for him. The counsel for the prosecution having thought proper to examine as to the confessions of the defendant, they must take them as they are given. They cannot reject a part and use the residue.

The Jury retired, and after an absence of two hours, they returned a verdict of not guilty.

Whereupon W. S. Smith is discharged from his recognisance, and his securities exonerated.

END OF SMITH'S TRIAL.

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TRIAL OF SAMUEL G. OGDEN.

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THE TRIAL

OF

SAMUEL G. OGDEN.

Friday, July 26, 1806.

PRESENT, JUDGE TALMADGE.

COLDEN made the same motion as in the case of W. S. Smith, for an attachment to issue against Messrs. Madison, R. Smith, Thornton and Wagner.

TALMADGE, J. The court make the same order in this case, as in the former, that attachments ought not to issue. The jurors were drawn as follows, 1. Joseph Strong ; 2. Benjamin Butler.

John Fellows upon being drawn, was challenged by Hoffman, as not being an impartial juror, and he prayed that triers might be appointed—whereupon

3. William Coit was drawn, and the three were severally qualified to try the challenge of J. Fellows.

Hoffman. I will open to the triers the nature of the challenge. A challenge need not go to impeach the moral integrity of a juror, but merely as to his partiality. By the term partiality, is meant any kind of resentment or animosity expressed, or indicated. A wish against the defendant is solid ground of challenge. If Mr. Fellows has expressed a wish, or a hope, that Mr. Ogden may be found guilty, it will be sufficient cause for setting him aside. If he has said that colonel Smith, on account of his merits ought, not to be punished, if convicted, but that if Ogden was found guilty, it was no matter how much he was punished, he will certainly be an improper juror. I shall endeavour to establish this fact by testimony.

James Ludlow sworn.

A few days previous to the sitting of this court, in a room at the corner of Pearl and Wall-streets, now occupied by Daniels as a counting house, I saw Mr. Fellows, and I asked him when this court would set; he told me on the 14th of the month; I ask-

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ed him what he thought of the trials that were then to come on; he said that colonel Smith was a clever man; that on account of his important merits, he ought to have some favour shown him, but as for Ogden it was no matter how much he suffered.

Hoffman. Did he express himself with any degree of anxiety? *A.* He mentioned it to me with some, and he told me he was summoned on the jury.

Sanford. Was there any one present at that conversation? *A.* I believe there was four or five persons there, but I do not recollect any one but the book-keeper.

Colden. Permit me to make one or two remarks. It is of the utmost importance, that the administration of justice should proceed without the bias of prejudice or affection, so that every man should have an impartial trial by his peers. It would be a sufficient objection to a juror that he had expressed a desire for the punishment of the defendant at any time, but it is very improper in a person after he is summoned to serve on a jury, to utter expressions like those proved to have been made by Mr. Fellows. I do not mean to impeach the integrity of that gentleman, but simply to show that he has formed an opinion out of doors, and that therefore, he is not that impartial juror which the law requires. If you do not think him perfectly impartial, your decision will be against admitting him to set with you on the present occasion; even should you doubt of his impartiality, it would be sufficient ground for the like decision; there are men enough summoned to serve on this trial without him. To me it is very evident, that he expressed himself with a degree of rancour against Mr. Ogden, which totally unqualifies him to set as a juror on his trial.

TALMADGE, J. You are to determine whether he is an indifferent man, and that you are to determine from the evidence you have received; if he does not possess that impartiality which the law requires, it is your business to set him aside, but it is not every slight ground of suspicion against the impartiality of a juror that is to prevail; the court have nothing to decide in this case, it is exclusively with the triers.

Hoffman. Unanimity is not necessary a majority of triers decide the question.

The triers retired for a few minutes, and reported as their decision upon their return, that Mr. Fellows was not an impartial juror.

The drawing of the jury was resumed, and Schuyler Livingston being called, prayed to be excused from serving, as having been one of the jurors who had passed upon the trial of William S. Smith. Colden insisted that this was no legal excuse, as it would be no cause of challenge; at any rate it could only be a challenge to the favour, and must be decided in the mode prescribed by law as to challenges of that nature. But the judge declined hearing any argument on the subject, and decided that

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the person called was not a fit juror, and ordered him to be put aside, whereupon the drawing of the jury was again resumed, and 4. James M'Connell; 5. David A. Cunningham; 6. James Palmer, jun. 7. John Bachellor; 8. Ezra Weeks; 9. John P. Groshon; 10. John M'Phie; 11. William Dunstan; 12. Andrew S. Norwood; were drawn and sworn and having taken their seats,

Sanford opened the indictment at considerable length. He stated to the jury that the defendant, Samuel G. Ogden, was accused of a high misdemeanour against the United States, which was charged in several different counts in the indictment. That the defendant was charged with beginning and with setting on foot a military expedition in the city of New-York, to be carried on from thence, against the territories of the king of Spain, in South America, at a time when the United States and Spain were at peace. That the defendant was also accused of having provided certain means for this expedition, and that the particular means charged to have been furnished by him, were a certain ship called the Leander, men, cannon, muskets, pikes, cannon-balls, swords and gunpowder. He stated that the testimony which would be offered on the part of the prosecution, would support and establish each of these allegations of the indictment, in the fullest and most satisfactory manner. That the proofs which would be laid before the jury were so clear and unequivocal, and so strong and convincing, that no man who should hear them, could doubt that the facts for which the defendant was indicted, really took place as charged in the indictment. He stated the object of the expedition and the evidence which would be adduced to support the prosecution, and observed that Mr. Ogden had been, throughout the whole transaction, an active and important agent in the offence, and that he had not only furnished the ship in which the expedition sailed, but had also provided much the greater part of all the means for the enterprise. He read to the jury the act of congress upon which the indictment is founded, and commented particularly upon the fifth section. The act, he insisted, was declaratory of the law of nations, and was passed in virtue of the power vested in congress by the constitution, to define and punish offences against the law of nations. He expatiated upon the atrocious nature of the offence, and its dangerous consequences, as tending to usurp the powers of the government to involve the nation in war, and to commit its honour and good faith, by the violence, rapacity, or ambition of individuals.——If the charges specified in the indictment, should be proved and established to the satisfaction of the jury as facts, it would be their duty to find Mr. Ogden guilty, and he trusted that they felt no inclination upon such an occasion, but to do their duty.

(Mr. *Sanford's* opening to the jury in this case, being in respect to all the general topics, very similar to his opening to the

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jury in the case of col. Smith, his address is on that account thus abridged and is not here inserted at length.)

The testimony given by the witnessess who were sworn on this trial, was generally correspondent to what the same witnesses gave on the former trial; it is therefore deemed unnecessary to repeat it. The witnesses were,

Jonathan Ogden, to prove the sale of gun-powder.

Peter Rose, the voyage of the Leander.

David Gelston, (collector) the clearancce and manifest.

Nicholas Romayne, his knowledge of Miranda and the expedition.

Joseph S. Bogart (notary public) drew the contract for the vessel, and filled up the role d'equipage. He also testified that he had shipped men for the Leander on her former voyages. That her usual complement was from sixty to eighty men. That about ten days before the vessel sailed, Ogden applied to him to ship forty additional men, and assigned as a reason for making that addition, that his two other ships, the Emperor and Indostan, had gone out lightly manned, and that these men would be necessary to bring them home. The notary also stated, that it was a fact within his knowledge, that the two ships above mentioned were in the West-Indies, and that they had sailed from this short-handed.

Edward Dartnel (a clerk to Mr. Ogden) made out the manifest in the regular course of his business.

William Wallan sold 100 quarter casks of gunpowder.

Bernard Hart sold 14 cannon, 6 and 9 pounders.

Martin Boerum keeps the magazine at Brooklyn, and delivered the gunpowder.

Thomas Stevenson made a quantity of pikes, &c. as beforementioned.

Richard Belden sold 130 horsemen's swords and 80 pair of pistols.

Samuel Corp sold 12 pieces of cannon.

Cornelius Brinkerhoof, as before.

William Fosbrook sold arms as per list exhibited.

William Allen sold arms more than 200 muskets.

John Moore sold arms, eight pair of pistols and three drills, and Mr. Ogden paid for them. The drills were little pieces of iron for cleaning the touch-holes of great guns, and were of the value of eighteen cents each.

Joseph Price sold arms to Ogden and an armourer's chest.

Benjamin Haight sold rifle belts and pouches.

John M'Lean, the same testimony as before.

Jonathan Fay sold 42 muskets, 20 sabres, six boarding pikes, four blunderbusses, and four pair of pistols.

Abraham Van Nest, as before.

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Jacob Hagerman saw arms and cannon-balls, &c. on board the Leander.

William Minugh, a pilot, carried the Leander down the 2d of February; he saw arms, &c. on board, and the ship received gen. Miranda at Staten-Island.

Mr. Shields (carter) carried cannon, &c. on board.

John M'Bride (carter) do.

James Clelland (carter) carried military stores on board.

James Corre (carter) the same.

Ebenezer Stevens sold some guns to Ogden.

Levingston Greenhart made some boxes for the package of muskets.

James Burbank (ferry-man) repeated his former testimony.

Anthony Bird did the same.

William Weyman (merchant taylor) made clothes, &c.

John Ripley sold arms.

Nathaniel Ward saw arms on board.

Augustus Fleming said Murray sold capt. Lewis 253 old and rusty swords.

Francis Gantz (ship carpenter) worked on board the same vessel, and saw cannon, shot and arms in the hold.

Jonas Mapes (merchant taylor) made uniforms for Loudon and others.

Thomas Stokes, the same as before.

George F. Hopkins procured the printing press and types.—With the examination of this witness the court closed the business of the day, and adjourned till to-morrow morning, eleven o'clock.

Saturday, July 26, 1806.

Daniel Ludlow, a witness, repeated the evidence he gave on the former trial respecting the 800 pounds sterling bill of exchange.

The testimony was here closed, and the witnesses were discharged.

Colden. We wish to offer evidence to prove the consent and approbation of the president to the expedition of Miranda. We do not now propose to prove this by the message of the president and the accompanying documents which the court have refused to admit, but by parole testimony.

TALMADGE, J. The court have the same reason to refuse now which they had before.

Hoffman, we offer Mr. Rufus King, to prove the president's knowledge and approbation; he is now in court.

TALMADGE, J. The question is decided.

Colden then addressed the court and jury as follows:—There would be an absurd affectation in supposing that you, gentlemen, who have been constant attendants in this court, from

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its commencement, and who have listened no doubt to what has passed with the same eager attention and curiosity which have been manifested, by the numerous concourse of our fellow citizens, who have continually pressed around us, are strangers to what has occurred in the trial lately concluded. You are, it is true, to decide the cause you are now sworn to try, on the evidence that belongs to it and upon no other. You ought not, and cannot have any reference to the testimony which you may have heard in the cause to which the present defendant was not a party. And this we beg you to impress indelibly on your minds. Yet there can be no impropriety in referring to the *arguments* which were used on that occasion, so far as they are applicable to this—I shall therefore think it unnecessary to repeat all you have already heard, and which might be urged in favour of the present defendant. A regard to your patience, as well as a consideration of my own strength, will induce me to observe what brevity I may.

However criminal the expedition of Miranda may have been, certainly no part of that criminality is attached to the defendant, Mr. Ogden. Whatever concern he appears to have had with it, has been purely mercantile. And his agency in this affair, has been no other than either of you, or any merchant might have had in the ordinary course of mercantile transactions.

But though this in itself might be a sufficient answer to the charge that is brought against the defendant, it is incumbent on us to examine more minutely the testimony which is before you. Besides, the respect we owe to the learned and able counsel who are opposed to us, requires a discussion of those arguments which the course of this business enables us now to anticipate.

It has been thought necessary, for the purposes of this prosecution, to stigmatize Miranda and his designs with the most opprobious epithets, and to impute to him motives not more meritorious than those which actuated Cortez and Pizarro, when they hunted with blood-hounds, and exterminated with fire and sword, for the sake of gold or in the frenzy of fanaticism, the unhappy natives of that country which gave Miranda birth, and which he is now seeking to liberate. How much does the character of men and their actions depend on adventitious circumstances; upon good or ill fortune? Success shall make that virtue, which without it would be vice. It is but a little six months since Miranda was here, and the very circumstance of his having in his breast the mighty project which he is now attempting to execute, recommended him, as you have heard, to the attention of our great men, and even of our public bodies; but now that Miranda is looked upon as an unsuccessful adventurer—now that he is thought to have failed in his enterprise, he is called a vile projector; and he and his associates, it seems, deserve all those hard

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terms which have been lavished upon them. But though adverse fortune should continue to pursue Miranda, he may still have the consolation to find that there is at least one kindred soul, whose congenial bosom is filled with the same love of liberty that fires his own; one who also has sacrificed his home by his struggles for the emancipation of his native country; one who knows and feels Miranda's merits, and who has told them to us in language that will be remembered as long as eloquence can command the estimation of men. But, gentlemen, I will not detain you another moment by any thing that is not immediately applicable to the case before you.

You have been told, in opposition to what has been asserted by the counsel for the defendant, that this is not a state prosecution; and Mr. Attorney has said that it has been commenced in the usual course of criminal proceedings. Gentlemen, I well know that there can be no proceedings in the courts of the United States by way of information—the constitution has happily protected our citizens from this arbitary engine of the English law. But when I call this a state prosecution, I do not mean to quarrel about words. I say and mean, that this is a prosecution commenced by the special order of the president of the United States, and this I am sure Mr. Attorney cannot, and will not deny. The evidence of it is before the court. But if this is a prosecution in the usual course, how does the honorable judge who now appears at your bar, come here? Why is not this prosecution, like all others, left to the ordinary law officer? No, gentlemen, it is because this prosecution is entirely out of the common course, to its being a prosecution in which the government feels itself deeply interested, that we have been instructed and entertained with the learning, ability and ingenuity of the honorable judge, who is associated with the official prosecutor.

There is one legal principle which you have often heard mentioned, but which it may not be amiss to repeat, because it ought never to be out of your minds, while you are about to pronounce the fate of the defendant. It is that this being a penal statute, it is to be construed most strictly. The defendant is not to be convicted, as has been candidly admitted by the counsel opposed to us, unless he has done an act which is prohibited both by the letter and spirit of the law. You are neither to omit nor supply words in the statute, to extend its application. I need not again refer to the authorities which have been read, to show you how scrupulously this rule has been applied in England, nor reiterate those arguments which have been pressed to convince you that it is as well dictated by reason and mercy as by law, and that it forms one of the strongest bulwarks of the citizens against oppression from the laws or their administrators. To find that this is a penal statute, gentlemen, you have only to look at the punish-

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ment it denounces against the defendant, if you should convict him. He is to be torn from his business, his friends and his family; he is to pay a fine, and may be shut up in the Bridewell, the prison for common malefactors and felons, for three years.—And yet, gentlemen, Mr. Attorney has called this a light punishment. Good God! did Mr. Attorney consider the ruin that has been already brought on the defendant by this prosecution; could he imagine the distresses of his family, could he contemplate the defendant, dragged from the rank in life which he has held, and shut within the gates of a prison, for three years, and then think this a light punishment. Possibly, gentlemen, the court may think so too, and you will not, therefore, commit the defendant to the mercy of the judge, till the most irrefragable proof of his guilt obliges you to pronounce a verdict against him.

The charges, gentlemen, against the defendant, though they are variously set forth in the indictment, in compliance with legal forms, are in substance, that he did begin and set on foot a military expedition to be carried on from the territory of the United States, against a power with whom we were at peace.

I will not detain you for a moment with the inquiry whether the defendant began or set on foot the expedition; there is no part of the testimony that in the least supports this charge. You have been told that the mere projecting the plan of this expedition was neither beginning it, or setting it on foot; that it was not began till after general Miranda returned from Washington in December, and that the first *overt* act after that time is to be considered as the beginning or setting it on foot. If so, then Mr. Ogden is not guilty on this charge, for it appears that general Miranda or colonel Smith was the first movers, for colonel Smith introduced general Miranda to Mr. Ogden. *(Here Mr. Colden was interrupted by the counsel for the prosecution, who stated that there was no such testimony.)* Mr. Colden then stated that he was content to forego any further observation on this point, and should only say, that from the testimony, it did appear that Mr. Armstrong, captain Lewis, captain Gardner, and several others were active in this business before Mr. Ogden appeared in it. I beg leave to add, however, said Mr. Colden, that the counsel for the prosecution, in endeavouring to limit the inquiries to transactions which took place after general Miranda's return from Washington, had exercised a very judicious precaution; for if a more extensive scope should be taken, it might appear that the president of the United States was one who set on foot, if he did not begin the enterprise.

But, gentlemen, it is of the essence of every charge in this indictment that the expedition of general Miranda was a military expedition. For though Mr. Ogden began or set it on foot, though he may have prepared and provided the means, though

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it may have been carried on against a nation at peace with the United States; yet if it was not a military expedition, the defendant has been guilty of no crime. What is there, then, that distinguishes this expedition from a hundred others of the same nature, which have been fitted out from this port, and every part of the United States, and which gives this the character of a military expedition?—First, say the counsel for the prosecution, this was an armed ship. But so she has been, and has been owned and employed as such by the defendant, for the last eighteen months, and has actually made several voyages to St. Domingo, with cargoes of the same nature with that she had on board when she last sailed with general Miranda. But the cargo, it is said, consists of articles fit for a military enterprise. The answer is, and so did the other cargoes, and though the articles were of this description, yet they were also articles of merchandize, and the witnesses that proved that they were sold to Mr. Ogden or others, dealt in them as articles of commerce, and there has not been a witness examined, who has not proved that gunpowder, ball, &c. were common subjects of traffic; so that if the crime consisted in exporting warlike stores in an armed ship, then half the merchants in the United States were guilty, and might, if the president pleased to order it, be dragged to the bar of a court of justice.

The regimentals were not more characteristic; for the very taylors who detail this very important testimony of the making some suits of regimental or livery clothes, say, that ready made clothes are very commonly exported. But what are we to say of the body of men, the mighty army who embarked in this expedition, and were the followers of general Miranda. First, gentlemen, let us ascertain the number of this mighty host, this military army, who were to fight and conquer millions, and subdue a territory equal to one-eighth of the globe. The ordinary complements of the Leander, on former voyages, according to the testimony of the notary was, from sixty to eighty men. I think one of the witnesses said she once carried ninety; but eighty were shipped in the first instance for this voyage, and afterwards Mr. Ogden engaged forty more to go in the Leander to St. Domingo, there to join the Emperor and Indostan, two ships of the defendant, which were then at that island, and which had gone out, according to the knowledge of the notary, weakly manned. Now, although the witness, Rose, has said, that the number on board the Leander when she left this port, was about three hundred, yet the more accurate testimony of the pilot ascertains that there were exactly two hundred and eighty; if we deduct from this the ordinary crew of the Leander, and also the other forty seamen intended for the other ships, there will be left, including printers and their devils, taylors, tinkers, blacksmiths, carpenters, generals, colonels, majors, &c. an army of about fifty men;

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and of these, all that were not seamen or tradesmen, and taken along for the purposes of their trades, were officers. So, here is a new kind of military expedition; at any rate, that is to say, a military expedition without soldiers. But, gentlemen, that something might be found on board this vessel, which might be called purely military, some certain drills have been dwelt on as matters of mighty consequence. Now these had been mentioned by the witness without my notice, and I confess I did not know what was meant by them; I could little suppose that they were what they now turn out to be, that is to say, little pieces of iron for cleaning the touch-hole of a gun, of the value at most of eighteen cents a piece, or in the whole one dollar and a half; and these important articles are to stamp the character of this expedition. But if cannon, powder and ball may be articles of merchandise, why may not drills be so also. This, gentlemen, is matter which I should have thought unworthy of so much attention, had it not been treated as a subject of very grave consideration on a former occasion.

I proceed, gentlmen, to take another view of this subject from the point at which we now are and I hope the counser for the prosecution will fairly meet us on the ground I am now about to tread. I challenge them to do so. Considering the great abilities and ingenuity of the gentlemen to whom this challenge is given, there may appear some temerity in this defiance. But it is not made from confidence in myself, but in my cause. I state then, gentlemen, that an expedition to revolutionize the Caraccas is not necessarily a military expedition. If Miranda had gone alone and had taken with him powder enough to burst the world asunder, and a pike for every finger in south America, this would not necessarily make his entreprise a military expedition. If his project had been merely to land on the shores of his native country, to erect the standard of liberty, to call his countrymen round it; to invite them to assert their freedom, and to put arms into their hands to enable them to do so, this would not be a military expedition. How does the case now before you differ from that I have supposed? Why he had forty men with him—Well but suppose I had myself undertaken this enterprize? (God knows I have no claim to so magnanimous a thought) I would answer, I have a right to travel if I pleased with a retinue of forty servants. Well but these servants it may be said had blue coats turned up with buff, (or buff coats turned up with blue—I really forget how this important part of the testimony was.) But have I not a right to travel with servants or followers in what livery I please? Again it might be said, some of your servants were called colonels, majors, captains, &c. and you had besides a secretary. And may I not ask what of all this? What law forbids my giving my attendants these names, if I have the folly or vanity to bestow them. Allow me, gentlemen, to relate to you an anecdote which comes within my own knowledge. "An

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American lately sailed from this to Europe, and was accompanied by a young gentleman. On their arrival in France the captain of the vessel applied to the police office for their passport. It happened that the American had held the office of a public prosecutor in this state, and had therefore sometimes been called as usual attorney general. The captain of the vessel, either with a view to flatter the vanity of his passenger, or for some other reason, asked for a passport for A. B. attorney general, and his clerk. The Frenchman not knowing what possibly to make of the words attorney general, but understanding perfectly what was meant by the term general, rejected the attorney, and conceiving that a general could be attended by nothing less than a secretary, made out a passport whereby general A. B. with C. D. his secretary, were permitted to travel unmolested, &c. And had not the gentleman taken some pains to have the mistake corrected, he would, as the names or addition in the first passport are never changed, have travelled over Europe as general A. B. with C. D. his secretary. And as the general and his secretary each had a pair of pistols with them, with competent ammunition, they might, no doubt, with as much propriety as the present defendant is accused, have been indicted on their return to America under this law for beginning and setting on foot, and preparing the means for a military expedition against the great nation. I hope, gentlemen, I shall be pardoned the apparent levity of this digression. It has been suggested, though there be no scripture in it, by the style of the arguments which I have heard on the other side, and as I have found the adverse counsel attempting to amuse you, I have been willing to contribute my portion of the entertainment. Perfectly conscious, however, how infinitely what I have offered, would be below what you have heard, (for certainly I do not recollect that I was ever more amused than I have been by the facetious efforts of the learned counsel for the prosecution) I have laughed till my sides are pained with the exercise. Before I quit this branch of my subject, however, I must notice two other circumstances, which, from the manner in which they have been inquired into by the counsel for the United States, I must conclude are considered as important:—They are that general Miranda drew his funds out of the hands of Mr. Daniel Ludlow, on whom he had a credit, and placed them in the hands of Mr. Ogden. And secondly, that Mr. Ogden went on board the Leander when she was laying at the quarantine ground, in a gig, and from thence proceeded in the vessel to sea. As to the first circumstance it is sufficient to say that if it be evidence of Mr. Ogden's guilt it is equally so of Mr. Ludlow's. For Mr. Ludlow had, before general Miranda withdrew his funds, paid his orders precisely as Mr. Ogden did afterwards. But it is absurd to say that either Mr. Ludlow, or Mr. Ogden were criminal, merely because they were the bankers of general Miranda. As to Mr. Og-

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den's going down to the hook in the Leander, it can only be necessary to remind you, that the testimony is, that he has done so in every other vessel that he has fitted out, since he has been in business.

Let us, gentlemen, before we pass over that part of the indictment which charges Mr. Ogden with providing and preparing the means for a military expedition, turn our attention to the articles which it is alleged he did provide or prepare. First the armed ship—but this, it appears, he provided or prepared in no other way than he has provided, and prepared the same vessel for a variety of other voyages. As to the men, he had nothing to do with any but those who were engaged as the crew of the Leander, or for the purpose of bringing home the Emperor and Indostan; and as to the arms and ammunition, they were articles of merchandize, in which the defendant had dealt, and which he had exported in the same way on fifty other occasions.

Let us concede, however, for the sake of argument, that this was a military enterprise, and that Ogden provided or prepared the means for it still if he did not know that it was such he is guilty of no crime. If a man does an act which is contrary to law, although he knows not the law, yet, according to the rigour of the rules for the administration of justice, he is said to be charged with the knowledge, and is to be prosecuted accordingly. Let this be so, yet, if he does an act which in itself is originally innocent but is criminal or otherwise as it may be connected with subsequent circumstances; if the actor had no view to the subsequent circumstances; if he was ignorant that his acts might be so connected, he is not criminal. To constitute a crime there must be a criminal intent at the time the act is done. As, if a man takes the goods of another there must be an intent to steal; if he breaks a house in the night there must be an intent to commit a felony, or if he passes false money it must be proved that he knew it to be such, otherwise he is not criminally answerable; so in this case though the defendant may have done acts, which if coupled with a criminal intent, would constitute a crime, yet all proof of such intent being wanting, he is to be holden guiltless. How does it appear that when Ogden furnished or prepared the means which are charged against him in the indictment, he knew that they were for, or could be applied to a military expedition. There is not a word of the testimony in this cause which in any manner connects Mr. Ogden with the views of general Miranda, or brings home to him the slighest knowledge of them. I beg leave, gentlemen, to refer you to an authority in this respect, and as I find that I shall want all the strength I have, before I can say all I think it incumbent on me to say in this cause, I will beg the favour of one of the counsel associated with me to read the passage. (Here Mr. Morton read a passage from Blackstone's

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Commentaries.) I will detain you no longer, gentlemen, on this part of the subject.

Again, gentlemen, let us admit that this was a military enterprise, and that Mr. Ogden, knowing that it was so, prepared the means. Yet if it was not an enterprise to be carried on from the territory of the United States, it is not a crime which renders the defendant obnoxious to the punishments denounced by the law. The statute evidently contemplates, that there may be a military enterprise set on foot, and that the means may be provided and prepared therefor within the United States, provided the enterprise or expedition be not to be carried on *from thence*. This will plainly appear, if we read this section of the statute, and leave out these words "*from thence*." Now, according to the rule that I have before mentioned, no words must be added or omitted, in order to extend the operation of a penal law. The inquiry then must now be, was this expedition to be carried on from the United States? We say a military expedition is to be carried on from the place, or port, where it takes its military character, which, in this case, was not till the arrival of the vessel at Jacquemel; there she was joined by new forces; the two schooners were there equipped, and an English schooner joined them. There the attendants of Miranda assumed their military characters, and received their commissions. The vessel was unfit for offensive operations when she left New-York; the men on board, not belonging to the vessel, were under no positive engagement to go further than Jacquemel. The arms were not in any order for a military expedition; and the testimony of the witnesses is, that when they took their departure from Sandy Hook, if they had then been off the Caraccas, they were utterly unprepared for military operations. Was this then a military expedition to be carried on from this place? No, the means for a military expedition, if any there were, were prepared here, as by the law they might be, but that expedition was to be carried on from Jacquemel, the port for which the vessel cleared. Suppose all the articles which were transported in the Leander, had been sent by other vessels to Jacquemel for the use of general Miranda, and had there been taken by him on board that vessel, and that she had then pursued the course in which we have now traced her, would this have been a military expedition carried on from the United States? Certainly not. It might have been said that the means were prepared in the United States, as lawfully they may be; but the expedition, it must be admitted would be carried on from the foreign port. And here let me say, our arguments on this point must have been grossly misunderstood, or are entirely evaded. We do not say, because the articles provided or prepared were articles of commerce, that they could not also have been military means; nor because the arms were not fit for military use when they left New-York that they could not have been made so; nor that the men could not have been military

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men, because their engagement was optional. But we call your attention to these circumstances, and beg you to observe, that the military expedition did not begin until the men, the arms, and other means were in a state to be applied, and were applied to a military enterprise, and that was not till the expedition assumed its form, shape, and character at Jacquemel, and therefore the military expedition, if there was one, was carried on *from thence*, and not from the territory of the United States.

I shall now, gentlemen, proceed to consider another material part of the charges in this indictment, which is, that the expedition of General Miranda was against the territory of a power at peace with the United States. We say, when this enterprise was set on foot, and the means provided and prepared therefor, Spain was not at peace with the United States. And here let me say, that we totally disavow the disorganizing principles which have been imputed to us. We do not maintain that every citizen may, with impunity, exercise hostility against a foreign nation in amity with our country. We are very far from asserting that each individual may compromit the peace of the nation, and by unauthorised acts of aggression, bring on us the horrors of war. These are jacobinical principles, most unjustly and artfully imputed to us. Even in a state of actual war, mutually declared, the individuals of civilized nations cannot, without due authority, carry on military enterprises against each other. But we insist, that if there was not an actual peace, a peace in every sense of the word, between Spain and this country, in the month of January last, then the defendant cannot have been guilty of the offence with which he is charged. If he has been guilty of some other offence, punish him for that offence. If he has been guilty of piracy, punish him as a pirate. If he has offended against the law of nations, punish him under the law of nations. But do not, because he may have been guilty of one offence, punish him for another. Do not convict him of a breach of a penal statute, because you may think that he has not observed some other law. Before I go further in the consideration of this point, allow me to say one word as to the admission that the counsel on the other side, have found themselves constrained to make. They admit that in this case, as in all other criminal cases, you are to be the judges as well of the law as of the fact. Yet they say this question of peace or war, is not to be determined by you. Why? because it is a question of law. How then are you to be judges of the law if you may not determine this point? It is for this reason, that you are not allowed to hear and read the president's message, and the various documents accompanying it, which we have offered to you in evidence. That is, you are to determine what the law is without hearing it, or the facts to which it is to be applied. They tell you that you must read the law, and yet shut the book. The counsel for the prosecution create imaginary difficulties on this point, with a design to

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deter you from undertaking to decide for yourselves, the question of peace or war. They say, that if this matter is to be determined by any other evidence than an act of congress declaring war, there is no longer any rule by which it may be determined, whether the nation be at peace or not. In answer to this, gentlemen, we say, true it is we can give you no precise rule which shall govern in this and all other laws; we cannot pretend to say that this or that insult or aggression, shall be sufficient to interrupt the pacific relation of this country with any other. It is not necessary for us to decide how many illegal captures of American vessels; how many unjust impressments of our seamen, or how many murders of our citizens at our threshold, by a foreign nation, will amount to a war; every case must depend on its own circumstances, and it is enough for us to say that in this case, invasion of our territory by the troops of Spain, the seizure and plunder of our countrymen, and the multiplied acts of hostility and robbery against our vessels, and on our citizens and their property on the high seas, did interrupt the pacific relations of the two countries; and however our government may have been disposed to submit to these outrages, Spain, notwithstanding, was not at peace with us. But though it be impossible, without some difficulty, to mark out the precise line between peace and war, there may be none in saying, that under certain existing circumstances, there is no longer peace. Who can fix the precise point between night and day; and yet are there not certain hours when we may say, now it is night or now it is day, without danger of error?

It seems to have been admitted, that if Spain had declared war against the United States, that then she would be no longer at peace with us, and that this indictment would not in such case be maintained. But, gentlemen, Spain will not be pleased to declare war against us—it is not now the fashion to precede a war by a declaration—it is not the modern etiquette. How then, if Spain does not choose to declare war, and yet acts as if she had, are we, notwithstanding, to say she is at peace with us. If so, then if she at this moment besieged our capital, we should be obliged to wait for a declaration of war from congress, before we might treat her as an enemy. In a word, gentlemen, it seems absurd to contend that no acts of hostility can interrupt the peace between the two nations, and that because the constitution has invested congress with the power of declaring war, we must, in opposition to facts and feelings, and reality, be considered as at peace till that declaration is made.

I have now arrived, gentlemen, at a very interesting part of this cause—I am about to consider that part of the subject, which has so much excited the sensibility of the public, and is the occasion of that concourse of people which we find attending here from

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day to day; I mean, gentlemen, the justification which the defendant sets up under the president of the United States. He says whatever he has done in relation to the expedition or enterprise of gen. Miranda, was done with the knowledge, consent, sanction and approbation of the president of the United States.—Here we must admit that the counsel for the prosecution meet us fairly; for they say that although the president of the United States should have expressly ordered this expedition, yet that such orders would be no justification for the defendant. There is something in this position so opposed to every man's feelings of what is right; so contrary to every idea of justice, that it seems hardly necessary to attempt to refute it by argument. But yet we will, if you please, bestow a moment's attention upon this point. I think it must be admitted, that circumstances might have existed, under which the president of the United States might lawfully have set on foot this, or any other hostile expedition against the Spanish. If congress had, in their secret sittings, declared war against Spain, they might have done so without making the declaration public; and under such a declaration the president would have been constitutionally authorised to take offensive measures. When, therefore, the defendant found that the president sanctioned the expedition of Miranda, he was justifiable in concluding he had authority to give that sanction. How does this differ from the case of a common magistrate and an inferior officer? If a magistrate issues a warrant to a constable to make an arrest, the officer can only inquire whether the magistrate acts within the scope of his authority; he is not to consider whether or not previous circumstances exist, which would authorise the magistrate to issue the warrant, such as an accusation on oath; but the magistrate having the power, under certain circumstances, to issue the warrant, the officer must take it for granted that the previous circumstances did exist, or at least it is not his business to inquire whether they did or not. He is to presume that the magistrate duly executed his power; if he did not, the magistrate would be answerable, and not the officer. So, here, as the president, under a secret declaration of war by congress, might have the power to order or sanction this expedition, the individual is not to inquire whether that declaration existed or not. If it did not, the president, and not the individual is responsible. To exemplify this reasoning by another case. In England, the power of declaring war is with the king. We have within a day or two seen republished in our papers a manifesto, under the signature of lord ————, one of the king's ministers, authorising hostilities and reprisals against Prussia, which authority could not be legally given without the sanction of the king. Let us suppose, that a subject of England had, in virtue of this manifesto, commited an act of hostility, and that when he

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attempted to justify himself under the order of the king's minister, he should be told, that that order could be no protection to him, because there had been no declaration of war by the king; would not the feelings of every man revolt at so unjust a subterfuge, and would not every sense of right and justice oblige us to say, the minister must be punished, but the subject excused.

I shall, gentlemen, take it for granted, that the orders or sanction of the president of the United States, would be a complete excuse or justification for the defendant, and proceed to inquire what is the evidence that the president had knowledge of, and did approve and sanction Miranda's expedition. And here we contend, that the counsel for the prosecution are precluded from saying that the evidence of this fact is insufficient, for they, having refused to let us lay before you the testimony we have offered, cannot now avail themselves of the want of proof, which they themselves have excluded. If you should think that the knowledge and sanction of the president would be a justification, every principle of justice requires that you should take that as if it had been proved in the most conclusive manner. The refusal to let us give testimony in this point, has prevented your hearing the evidence we had to offer, and must be taken as strongly for us as if the fact we allege had been proved by a thousand witnesses. Though the counsel for the prosecution have not thought proper to examine, in this cause, their own witnesses whose testimony afforded the fullest evidence of this fact, on the trial of col. Smith, and though we are not permitted to examine the numerous witnesses who are attending here on our summons to give their testimony, and although others, whom we have subpœnaed, have been excused from attending; yet there are notorious facts from which the conclusion that the president and secretary of state, knew and approved of this expedition is inevitable and irresistible.

First recollect the notoriety of the equipment of the Leander. There was not a circumstance connected with the expedition that was not known here to every body; it was conducted under the very eyes of the officers of government. But it was well known at Washington—of this the letter of Mr. Duncanson affords strong proof. (Here Mr. Colden was interrupted, and told by the court that that letter was not in evidence in this cause) Mr. Colden said he would suppose the case—suppose a letter had been sent from Washington stating—(here Mr. Colden was again interrupted by the court, and told that such suppositions would not be permitted) Mr. Colden then said he should submit to the decision of the court. He was content to let the jury draw their own inferences from what had passed before them, and would only request them to recollect the circumstances of gen. Miranda's visit to Washington; his frequent interviews with the presi-

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dent and officers of government, which was in evidence in this case.

I shall not detain you, gentlemen, with reading any of the authorities which have heretofore been read, to show what is your province and what your rights and duties as jurors. It is admitted by the counsel for the prosecution, that you have the right to determine the law and the fact. But this is not enough, we say that you are bound by the most sacred obligations—by the obligations of your oaths—by your obligations as citizens—by the obligation that every one is under to protect innocence—by the obligation which binds every freeman to oppose oppression, and stem the abuse of power—by all these you are bound to exercise your right, and to judge of the law as well as of the fact.

I will add, gentlemen, but one word more. This is a prosecution commenced by order of the executive government. I repeat it again, it is a state prosecution. I might say persecution. The defendant tells you that he can justify himself by such and such witnesses; but when these witnesses are regularly called upon by the defendant, in the mode pointed out by the constitution, the president, the prosecutor, writes a letter to the court, and tells the court he cannot spare these witnesses, and, what is most extraordinary, that he will never be able to spare them, when they may be wanted for the purpose of this trial. And it is not only the heads of departments who cannot or will not attend, but even the clerks in their offices are kept back. The affairs of the nation will not even permit a temporary absence of one of these. Is this just? Is it giving the defendant fair play? and will you convict your fellow-citizen under circumstances like these, let the testimony which you have heard be what it may? We are indeed told, that we might have had the deposition of these witnesses under a commission, and interrogatories. But we have indignantly refused such an offer, and we protest against its having that influence on your minds for which it is insidiously intended.—Why should these witnesses be allowed to shrink from an open and public examination? Why should they be allowed to deprive the defendant of the benefit of that provision of the constitution which declares, that "the accused shall have the right to be confronted with the witnesses against him?" Why should not this defendant have the same fair open trial that the law allows in every other case? Why shall not these witnesses be obliged to stand before you, and submit to a cross-examination, as witnesses in other cases are obliged to do? Why should they have an opportunity, which is not given in any other criminal case, of giving evasive, qualified and coloured answers. There is no reason, gentlemen, why this defendant should not have all the benefit of the laws that any other accused might have; and however the administration may wish his conviction, and have therefore suppressed his testimony, you cannot, you will not, convict one who has not had a candid fair and impartial trial.

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Mr. Hoffman. Gentlemen of the Jury, I had hardly expected it would again have been my lot to address a jury of my country, on the subject of the present prosecution. I had trusted that the triumphant acquittal of col. Smith, would have furnished a deep and effectual admonition to his prosecutors; and I little expected, that they would have attempted to atone for their defeat, by the conviction of Mr Ogden.

The question in the present cause is the same as that of col. Smith's; its merits have, therefore, already received a patient, minute and ample investigation. An impartial and independent jury, selected from various classes of society, and from the different political sects into which our citizens are divided, have honourably acquitted col. Smith; and in his acquittal the innocence of Mr. Ogden was virtually pronounced. It was hoped, and indeed expected, that the irksome and odious business of prosecution would here have ceased. The innocence of those gentlemen, touching the transaction in question, had been thus established—the correctness of their conduct, as it concerned the enterprise of gen. Miranda, had been made manifest. The spirit, nay, the very letter of the law had been tested, with regard to their agency in that affair—both the spirit and the letter had pronounced the agency of col. Smith, and consequently that of Mr. Ogden, innocent.

If then, it was merely the wish of government and its agents, to ascertain the culpability of these defendants, such object was fully answered; and on that verdict being pronounced, the prosecution of Mr. Ogden should have been dismissed.

If it was not the *individual*, but the crime, that was the object of this judicial process, then the prosecution should have ceased, when the non-existence of the crime was proved. But it seems, from motives best known to those who have instituted this inquiry, that another, and a similar experiment is to be made on the discernment and justice of a jury. Vain effort! The verdict so lately rendered in this very court, on the subject of this very trial, is still glowing in the public mind. You have all witnessed the general and unequivocal sentiment of approbation which it excited—you have heard the jurors who delivered that verdict, honoured with the heartfelt applause of their fellow-citizens; and can it be expected that you will act in direct opposition to so noble an example—in direct opposition to every just and generous principle, and sacrifice the defendant to the lawless pleasure of the government.

Gentlemen—the defence of my client has already been so ably conducted by my friend who has just spoken, that I find the field of argument extremely limited. Nor, indeed, do I feel any obligation to detain you long. The testimony which has been repeatedly scrutinised in your hearing, must be so deeply engraved

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on your memories, and the principles of law, involved in the controversy, must by this time be so familiar to your minds, that any particular recurrence to them would be superfluous. I shall therefore recal your attention, rather to general principles and remarks, than to any minute and elaborate discussion.

Gentlemen, you are constitutionally invested with the right of judging both on the law and the fact, in criminal cases. This great principle, so indispensable to your efficacy as guardians of private right and personal liberty, is now established by the constrained admission of our learned opponents.

It was desirable, for the cause of justice, for the honour of of those who have instituted this prosecution, and for the more satisfactory exculpation of my client, that the counsel of the government would have permitted every circumstance connected with general Miranda's expedition, to have been thoroughly unfolded. Then, indeed, would you have been enabled to apply this important principle; and in a more satisfactory manner, to have exercised your acknowledged rights. We should then have introduced General Miranda to you, with his letter of credence from England, which was forwarded from here to our executive government. We should have followed him to the city of Washington, where he disclosed his views in person to the president. We should have pointed him out to you, the companion of the secretary of state, and enjoying all the courtesies of presidential favor. We should even have endeavoured to procure you a peep into the audience chamber, where affairs of high import and state-secrecy, were calmly discussed and arranged. But these matters, it seems, are too sacred for open disclosure, or for vulgar observation. Clouds and darkness are round about them, and you must be content to gain a knowledge of their nature, from the casual gleams thrown on them by chance and circumstance.

Before I proceed further, permit me to advert to another important principle, necessary for you to recollect, that you may be clearly acquainted with the extent of your powers. Your deliberations are not to be confined merely to the bare facts specified in the indictment.—Were that the case, gentlemen, your scope of action would be limited indeed. You would be entirely at the disposal of a public prosecutor; he might so frame his indictment, as to compel you to render a verdict, in absolute opposition to your real opinion of the nature and existence of the crime. He might kindly select such acts as would suit his purpose, and suffer a jury to decide on them merely; but the law he would carefully reserve for, what he might think, the courteous opinion of the judge. Thus shackled and circumscribed, a jury would become as mere puppets in the hands of the juggler—they might be made the automata of go-

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vernment, to act their parts, according as the hidden mechanist puts them in motion. No, gentlemen, you hold a more elevated rank in the administration of criminal justice. On the magnitude of your powers, and the integrity of your decision, the accused relies for an acquittal. He demands your judgment on the law, and he claims your decision on his conduct in the Miranda transaction, viewed in its real merits and most extensive latitude: neither restricted to the counts of an indictment, nor to the evidence selected by the prosecutor. You are to scrutinize with microscopic, but with liberal eye, his actions, his motives, and his intentions. You are to examine whether he was actuated by dangerous, dishonourable, and illegal views; or whether his object was pure, honest and laudable. Whether he acted in wilful hostility to the laws and interests of his country, or whether, in fulfilling the suggestions of government, he erred in conduct, either from ignorance of the powers vested in the executive department, from a misplaced confidence in their wisdom to discern the limits of their own authority, or from a too credulous reliance on the candour and integrity of their word. Having thoroughly investigated these facts and circumstances, you are to decide on his innocence or guilt. Leaving to little minds the subtleties of legal disputation, you are to declare whether, on the broad and plain principles of unerring justice, he deserves to be consigned to punishment and degradation.

Gentlemen—I shall endeavour first to convince you, that the proofs do not establish the facts charged in the indictment; and secondly, if I should fail in so doing, that the conduct of the defendant was completely justified, by his having acted under the sanction, and with the approbation of the president.

The fifth section of the statute on which the defendant is indicted, declares, "that no person shall, within the territory or jurisdiction of the United States, begin, or set on foot, or provide or prepare the means for any military expedition or enterprise, to be carried on *from thence*, against the territory or dominions of any foreign prince or state, with whom the United States are at peace." I hardly need remind you, that this being an act extremely penal, it requires a strict and literal exposition. No inference can be made to embrace the case of the defendant. The proof offered must be plain and positive—nothing ambiguous, nothing uncertain, nothing left to conjecture. In a prosecution like the present, the most rigorous rules of evidence should be applied in favor of the accused, and the most conclusive proof of his guilt should be exacted.

The testimony produced, places the agency of Mr. Ogden in the light of a mere mercantile speculation. He charters his ship to general Miranda for a voyage to St. Domingo. He

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sells him a cargo of contraband articles, among which are arms and ammunition, and he agrees to receive for them a stipulated price. He pays money on Miranda's account. The vessel is cleared out for, and actually sails to St. Domingo. The captain, in his manifest at the custom-house, (with which manifest, by the bye, Mr. Ogden has nothing to do) describes the arms and military weapons as ironmongery, according to established uses in cases of contraband; not to deceive our own government, for that did not prohibit the importation of warlike implements, but for the purpose of concealment from the cruisers of belligerent powers. These are the principal, nay, almost the only facts brought forward in support of the charges in the indictment. Strange as it may seem, there has not been a particle of evidence offered, to prove any other than a mere commercial connection between general Miranda and Mr. Ogden. No evidence that Mr. Ogden was acquainted with the general's intentions, or even that he knew the Leander to be destined ultimately for the Caraccas. A different course is now pursued from that adopted on the trial of colonel Smith. It was then judged important to prove, that he was privy to the schemes of Miranda, and that his agency was granted for the express purpose of promoting the revolutionizing plan in agitation. To substantiate this point, no pains were spared to collect evidence, and produce witnesses. The ties of private confidence were burst asunder; the favourite companions of col. Smith, to whom it was presumed his secret thoughts and intentions were unfolded, were ungenerously dragged to the altar of public justice, and commanded to assist at the sacrifice of their friend. By the reluctant testimony of these witnesses, it was expected to prove col. Smith's knowledge of Miranda's designs, and that they received his approbation and support. But, unfortunately for their cause, the counsel for that prosecution overstepped the line of safety, in the eagerness of pursuit; and provoked a train of evidence, which evinced the innocence, and accomplished the victory of col. Smith. A different course is now pursued. Instructed by mortifying experience, they prefer rather to leave their proof imperfect, than to attempt the conviction of the defendant by similar witnesses. They feared again to bring to light circumstances and facts, more injurious to the government, even than the acquittal of the defendant. Were not this the case, the public prosecutor might have availed himself of testimony at hand. Col. Smith, the associate of Mr. Ogden, has not withdrawn himself from the demands of justice—nor did his friend interdict his attendance in this hall. He would have been a legal witness; he could no longer have interposed the defence of self-crimination, to any inquiries which might have been made of him—for he has passed through the ordeal of a similar trial,

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and came forth uninjured. He would willingly have stepped forth a witness in the present cause, and have filled the present chasm in the testimony; but in so doing, he would have delivered a "round unvarnished tale," and put down for ever the contriver of this prosecution.

Are you disposed, gentlemen, to supply by inference this defect in their proof? Is this prosecution so pure, so liberal, so disinterested, as to deserve your kind and fostering aid? Not so—no accusation can be intrinsically just, that depends on mystery and concealment for its success. If the mantle of secrecy is still permitted to envelope the occurrences at Washington, your imaginations will not construe the matters it conceals, to the disadvantage of my client; nor will you listen, with partial ear, to the suggestions of his prosecutors. Be assured, if certain illustrious statesmen should ever have the candour and magnanimity to withdraw the curtain, and admit us to a full view of the exhibition, Mr. Ogden will be seen to tread the stage with as firm a step, and as erect a front, as the boldest hero in the drama. While, however, the enemy think proper to observe a kind of legal bush-fighting, to lurk in hiding places, and level at him behind thickets, he will not be thought deficient in frankness, if he seeks to shelter himself behind the forms and rules of law.

Gentlemen—the inquiry on the proof, seems to resolve itself into a single question—Is the selling of arms and ammunition, or the furnishing of a cargo of that description, sufficient to convict the defendant of an offence against the statute? Can any person seriously contend for a position so absurd? Can any one deny, that it was lawful to have shipped them to St. Domingo, or even to the Caraccas, there to be sold; or that it was equally lawful to have delivered them at either of those places, in virtue of a previous contract of sale here? Even the knowledge that they were to be used against a nation at peace with us, would not render such sale illegal; much less would it constitute an offence against the statute. Were such a construction to be admitted, many among our first and most irreproachable merchants, would not be secure from indictment? Arms and ammunition are articles of ordinary commerce, and almost of daily exportation. They are furnished by us to foreign nations, not to be used against our enemies, for we have none. Thanks to our pacific, wise, and philosophic administration, we can have none. It has acquired the art, by *silver-tongued persuasion*, by arguments *written in letters of gold*, to keep all hostility from our doors; and while our treasury will furnish a supply of its powerful ammunition, we are assured of a protracted, if not a glorious peace. Since then we have no foreign enemies, in shipping arms and ammunition for foreign use, we of course send them to be used against some nation at peace with the U. States; and if this is a crime, the majority of our merchants

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stand amenable to the law. In all these cases, equally as in the present, arms and ammunition were shipped expressly for the purpose of being used, in the language of the statute, "against the territory and dominions of a foreign prince or state, with whom the United States were at peace;" yet I am sure you cannot conclude, that the merchants sinned against the statute, particularly when I shall show you, that congress expressly countenanced their exportation.

In pursuing this part of my subject a little farther, I would call your attention to the St. Domingo trade. Without the aid of this country, it may safely be doubted, whether the present government would have been established in that island—and let it be remembered, that it is a government as yet unacknowledged by any other nation. The empire of Hayti is, at this moment, considered by us in a state of revolt against its parent country, and as an appendage or colony of France. Toussaint, who first elevated there the standard of revolt, depended for his military stores on supplies from the United States. France was then at peace with us. The arms and ammunition required by the rebel chief could only be used against the French, his former masters, and to whom he owed allegiance. Yet arms and ammunition were furnished to him from American ports; nor has it ever been pretended, that by this proceeding the statute in question was violated.—Again, Toussaint is subdued—Dessalines becomes his successor, and he also seeks and finds resources in the U. States, by means of which he conquers and expels the French. This trade in arms and ammunition with St. Domingo becomes the subject of frequent investigation by congress. Its prohibition is refused, until the last memorable session, when, doubtless for the most pacific and accommodating reasons, our government is induced to interdict it by law. If then the St. Domingo trade was, until that period, lawful—I ask where is the substantial difference between the trade so carried on, and that which is proved against Mr. Ogden. The cases are similar, and where a shade of difference does exist, it assuredly is not against the defendant. I have before urged that the words "*from thence*" used in the statute, can only be construed to denote an expedition, proceeding directly from the U. States, against a nation at peace with us. The trade with St. Domingo, proceeded directly from the ports of the United States, to those of that French colony. It knowingly provided the means for military and hostile enterprise, to the revolted blacks. Had one of the generals of Toussaint or Dessalines visited the United States in person, purchased these supplies, and chartered a vessel for their transportation, it would have made no essential difference in the transaction, nor would any merchant have hesitated, on scruples of law, to conclude a bargain with him. I therefore boldly insist,

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that if you criminate in this instance the commercial transaction of Mr. Ogden, you implicate the conduct and safety of every merchant, who furnished arms and ammunition to the revolted inhabitants of St. Domingo; but this is a point on which it would be useless to enlarge, for it is one on which the opinion of congress has been made known by the prohibitory law of the last session—which is a statute, introducing a new law, and not a declaratory act.

In the present case, the learning and ingenuity of the opposite counsel, stretches still further the pliable and convenient contruction of the formidable statute, on which this treatment is founded. Mr. Ogden sells arms and warlike equipments to general Miranda; they are transported by him to St. Domingo, and from thence, as circumstances render it adviseable and expedient, they proceed and form part of a hostile enterprise against the Caraccas. Now this mere *commercial* act of sale and exportation, is tortured by artful construction, and subtle argument, into the form of a military expedition, proceeding from the United States, *directly* against a Spanish colony.

But, gentlemen, even admitting that the facts charged against him are sufficiently proved, still I feel no anxiety for the certainty of Mr. Ogden's justification. I will not detain you by repeating facts and arguments heretofore urged, to prove a state of hostility with Spain. I merely call your attention to this singular construction of the constitution—this curious and incongruous dilemma, maintained by the opposite counsel—that *a nation may be at war with us, yet we at peace with them!* That certain forms and declarations, devised in the cabinet, and announced in the forum, are requisite to constitute war—That Spain may invade our frontiers—establish posts within our territory—molest our commerce, and carry our fellow-citizens into captivity; and yet, say these admirable logicians, we are in a state of perfect peace and tranquillity, because congress has not declared us in a state of war. Is war then, Gentlemen, a mere nominal thing? Does it exist in the mere breath of congress? Does its hitherto ungovernable chances, depend solely on their volition? If so, they arrogate to themselves supremacy over the very order of things—As well may they pretend to controul the winds and clouds of the heavens. As well may our opponents insist, while the thunder rolls and the tempest rages, that the fury of the elements is not showered upon our heads, because congress has not declared us in a storm; a doctrine so feeble, so absurd, so ludicrous, bears on its forehead its own confutation.

Nor shall I again discuss the relative powers of congress and of the president, with the declaration of the latter, in his message of the last session, that we were not at peace with Spain. The arguments on these points were delivered in your presence,

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and I trust they have sufficiently established themselves in your minds. The president's approbation of the enterprise is a ground on which Mr. Ogden's conduct may be justified, even if you believe the charges of the indictment to be established. This approbation was clearly substantiated on the late trial. It was the polished buckler which protected col. Smith from the shafts of his adversaries, and reflected back the scorching rays of accusation, on the power which directed them. The proceedings, and the termination in that cause, have fixed the responsibility in the quarter, where public good and private justice require it should be placed. Fortified by the decision on that trial, I am emboldened to assume the principle as an established one in these prosecutions—that the approbation and encouragement, given by the executive to the enterprise of general Miranda, with his knowledge of the intended agency of Mr. Ogden, acquit the latter from the charge of intentional crime, and insure him from the penalty of the particular statute on which he is indicted.

Gentlemen, did the president of the United States, and the secretary of state, know and approve of general Miranda's enterprise? This is a fact, of which no person can any longer entertain a doubt, and of which you have sufficient testimony. Evidence differs in its requisite characteristics according to the situation of the parties. If it is to criminate an accused individual, and consign him to the scaffold or the dungeon, it must be direct, positive, and unequivocal. But if in favour of an acquittal, any evidence of a circumstantial nature, which shall convince you of the existence of a fact, ought to be equally imperative as if it was direct and absolute. It is a wise and benign maxim in our law, that innocence shall always be presumed until guilt is proved. Presumptions ought rarely to be indulged for the conviction of a prisoner, but they should be liberally entertained in his favour.

In a prosecution like the present, urged by the government, who feel their honour and integrity involved in the event—who seek through charges of an unworthy and perfidious nature, to exonerate themselves by the crimination of the accused. In a cause like the present, where the contest is waged on terms so notoriously unequal—where an humble citizen is thrust into the arena, and forced to contend against the power and popularity of his own government—where the fulminations of executive wrath are hurled at his head, and the underminings of secret artifice are wrought beneath his feet; where the only weapons he can be permitted to use, are positive proofs drawn from secrets of state, in possession of his enemies, and even these weapons are denied him. In such case, the unfortunate individual, naked, crippled, and defenceless, must fall a victim in the unjust and treacherous encounter, unless you, the impartial judges of the

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combat, shall exert your prerogative, and allow him to protect himself with the shield of circumstantial proof. Such, gentlemen, is your duty on an occasion like the present; I claim it of you in behalf of my injured client—the testimony necessary to his exculpation, is denied to his just demand; it is closed up and hermetically sealed, that nothing may transpire. He calls upon you then to exert your right of inference—to scrutinize into the circumstances of his case with a searching and an anxious eye—and to find where "truth is hid," even though it were hid indeed within the centre."

What are the circumstances, gentlemen, to which he solicits your attention—To be sure you have no letter from capt. Duncanson read to you—nor have his prosecutors again furnished the accused with powerful testimony, by their blind zeal to pry into his confidential communications. But we can afford to spare these circumstances, since we have a source of evidence to supply the want of them, and one moreover of a most authentic nature. We have fortunately succeeded in producing before you the journals of the senate. I have already stated, that it was lawful to export arms and ammunition from the United States, and I read the journals of the senate to show, that congress, at the last session refused to prohibit their exportation. But I propose availing myself of the production of these journals for another purpose. I request your attention to a remarkable coincidence between the visit of Miranda to Washington, and the history of a bill then before the senate; with me you will conclude, either that his secret understanding with the heads of departments, announced to him its fate, or that his communications appear to have been dictated by a spirit of prophecy. The session commenced on the 2d Dec. 1805. An act prohibiting, for a limited time, the exportation of arms and ammunition, passed rapidly through the house of representatives. In tracing its progress in the senate, it is curious to observe how suddenly and effectually its course was arrested. By the journals of the senate, it appears, that on the 13th Dec. the act was read a second time, and referred to a select committee. If this bill had passed the senate; or if it had been treated with a dispatch similar to that which it had experienced in the house of representatives, in the former case his views would have been defeated; in the latter, his apprehension of its passing would have paralised his exertions. Yet, Miranda, with this bill before his eyes, which might, at any moment, become a law and arrest his enterprise, proceeds, while at Washington, to encourage his associates. He perseveres in his preparations, not in a hurried and eager manner, as if anxious by expeditious movements to anticipate the passage of the bill; for he did not contemplate a departure until some weeks after its introduction into the senate. On the 13th

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December, two days after Miranda's arrival at Washington, this bill was committed to a select committee, in whose hands it slumbered till the 4th of February, two days after the actual sailing of the Leander, when it was reported with amendments. Here is indeed a singular coincidence of dates and circumstances. It is true, chance sometimes produces a wonderful concurrence of unexpected events, and the present instance, we will charitably suppose, may have been among the number of such casualties. But let me for a moment be indulged in stating a case, not, however, because the fact has been so asserted in the public prints, so suggested in private correspondence, or so represented in the memorial of Mr. Ogden to Congress; for neither of these is evidence. Let us though, in contemplating possible, nay probable events, imagine the first confidential interview between Miranda and the secretary of state. Having familiarly talked over his plans, exhibited his maps and charts, submitted his private correspondence to inspection, and requested the assistance of the United States to liberate his country; the objections to avowed encouragement by government having been stated, its secret countenance promised, and the necessity of eluding existing laws suggested; the general then delicately touches on the pending bill, prohibiting the exportation of arms and ammunition; he states impressively his apprehensions, lest, by the enaction of such law, his enterprise should be conclusively prevented—but here let imagination pause, nor unveil too minutely the arcana of the cabinet. The replies, whether frank or qualified, by which Miranda's fears on this important subject are dissipated, may be presumed from his subsequent conduct. He writes to his friends in New York, informing them that the bill will not pass, and he proceeds on his preparations at such leisure as convenience requires, but with such unabated spirit, as a full security from legal impediment would warrant. The bill tranquilly reposes in the committee chamber of the senate during the six weeks, in which its discussion, by agitating the public mind, would have embarrassed its movements. It is *finally rejected*; a most fortunate and accommodating circumstance for his subsequent shipment of reinforcements. Thus were the predictions of Miranda verified—the predictions of a stranger to our country, our national policy, and the individual sentiments of our congressional representatives; a stranger who, as our opponents would have us believe, was almost entirely unacquainted with the heads of the executive department. Wonderful man! who, by the mere transient observations of two or three days residence at Washington, could foresee the premeditated defeat of a measure, that had received so rapid a sanction in the house of representatives; a measure that would alone have dis-

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appointed him of all his golden prospects, and have blasted in the bud his high wrought expectations. Gentlemen, do you now believe that this strange coincidence in dates and circumstances, was altogether fortuitous?

You must all be sensible that Mr. Ogden has done every thing in his power to give you entire satisfaction on this subject, and to dispel every shade of mystery that might be cast upon it. The proceedings of this very court testify his solicitude to establish his innocence by the declarations of his very prosecutors. At an expense equal almost to the pecuniary penalty which would follow his conviction, he has endeavoured to enforce the attendance of those witnesses, who alone could elucidate the equivocal circumstances of this transaction. But his adversaries shrink from the inquiry—they disobey the process of this court—they withhold the positive proof important to this defence; and yet it is insisted, that by positive proof only shall he be justified. To keep back or suppress evidence in civil cases, affords to the opposite party the right of drawing the strongest inference of a fact; and for the most cogent reasons—for it is clearly to be presumed, that if the evidence suppressed could destroy such inference, it would unquestionably be produced. Are the rules of evidence, then, more rigid and less equitable in criminal cases? This indeed would be singularly contradictory to the principles of justice. It would argue, that the mere pecuniary concerns of men, are entitled to more consideration, than their characters or liberty. No, gentlemen, in criminal cases, every wilful suppression of testimony should be sternly discountenanced by a jury; they should deduce from it liberal and indulgent conclusions in favour of the accused. The mild and humane spirit of our criminal jurisprudence, disclaims a persecuting temper; delighting in mercy, it yields no assistance to the purposes of animosity or revenge. It seeks no end but the dispensation of public justice —justice equal and impartial; unobscured in its operations by mystery or prevarication—uncontrouled in its progress by the arbitrary mandates of power. It would be idle and absurd for the opposite counsel to tell you, that this is a prosecution conducted in the ordinary way. Does not one of the witnesses, whose attendance is withheld from us, declare in his own letter, that this prosecution was ordered by the president? Do we not behold at this bar one of our most celebrated advocates, a judge of the United States for a neighbouring district, retained as counsel to assist the attorney general? From these and other obvious circumstances, it is evident, nay it is notorious, and I may add, it is avowed, that this prosecution derives its origin from the exalted source which I have designated. It is equally manifest, that the elevated prosecutor, *by his own mandate*, represses and withholds the testimony, to obtain which this trial was formerly post-

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poned, and which was deemed essential to the justification of my client. Since, then, this is unequivocally and explicitly a state prosecution, it demands from you more than ordinary attention and circumspection. If, in the measures adopted, there appears the least colouring of oppression, your jealousy should be alarmed, your utmost vigilance excited. The more dignified the situation of the prosecutor, the more extensive his influence, the greater is the danger which may result to public safety from his misconduct.

The president of the United States, and the secretary of state, have been openly and expressly charged with a knowledge of general Miranda's intentions; they have been represented as encouraging and participating in his plans—as directing a perfidious and oppressive prosecution against those whom their countenance had beguiled. The complaints and charges of Mr. Ogden have even been proclaimed by him in congress chamber, before the assembled representatives of the Union. What an attack on the spotless reputation of these immaculate statesmen? But they treat it with a dignity characteristic of themselves. Theirs is a philosophy of no common stamp—a philosophy to which we humble mortals are total strangers, which is elevated equally above our powers and our emulation. It is a philosophy which bathes their souls in the torpid waters of insensibility, and renders them, like the Grecian hero, impervious to the weapons with which ordinary beings are assailable.

The love of popularity, common to our nature—the impatience of reproach, which every honourable mind must possess—the jealousy of reputation, inseparable to a heart of sensibility, can achieve no entrance in bosoms superior to the weak feelings of mortality. Though exposed to the severest censures, charged with a participation in deeds, which they themselves have pronounced criminal, and against which they have levelled the heaviest artillery of the law—accused of artifice, hypocrisy, persecution—stigmatised as men, as statesmen, as rulers—yet can these illustrious dignitaries calmly submit to the load of opprobrium heaped upon them; though, by a plain tale, a frank avowal, these calumnies might be silenced for ever.

Gentlemen, can we possibly believe in this stoical apathy—this proud contempt for the opinions of others? Can we be persuaded that these chiefs of our nation are of such different construction from their fellow creatures—of minds more transcendent—of virtues more conspicuous—that they take no pleasure in the empty acclamations of the million—that the incense of popularity imparts no delight to their senses—that the lustre of official rank creates no palpitation in their hearts, nor does the rod of power afford any pleasure to their grasp? Or shall we be inclined to scepticism on these points—to suspect that after all,

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they are but men—mere common mortals; subject to the same heat and cold—the same summer and winter as ourselves? Inspired, like us, with the same love of fame—the same desire for popular approbation—and that their apparent indifference to these objects of human ambition, is owing to some other cause, than that of insensibility? Yes, gentlemen—it is too evident that they have reasons for their conduct, secret and imperious. Believe me, if the witnesses withheld could have purified the character of the executive from the foul stain of reproach, they would never have been refused to this tribunal; the president would undoubtedly have found means to spare some of them—he would not, to use their own language, "*specially* have signified to them, that their official duties could not, consistently therewith, be *at this pressing juncture* dispensed with."—What pressing juncture? Has any extraordinary circumstance occurred, sufficiently important to render their united wisdom essential to the cabinet deliberations? Our foreign affairs are in a state of amicable, if not honourable adjustment. Peace offerings have been made to sooth the angry powers of Europe, and we are flattered with assurances of their wonderful efficacy and permanent effects. Are we then disturbed by domestic broils—by internal commotions—requiring the paternal vigilance of the executive? No, we are in the full tide of successful experiment—we are sailing on smooth water; our bark glides majestically along, with all the advantages of wind and tide—no lowering in the horizon—no symptoms in the elements of an approaching storm; the very pilot seems to doze securely at the helm, and to lull the crew asleep with his song. What then is this juncture, which so specially demanded their attendance at Washington? We had trusted, that the very season of the year would have insured us their presence. It is their customary season of recreation—when they lay down the heavy burthen of national concerns, and seek relaxation and amusement in the various scenes which travelling presents—nay, I am much deceived in my expectation, if we do not hear, in a little while, when this trial shall be finished, that *the mighty pressing juncture* has passed, and the secretary is taking his annual excursion. Away then with such fictitious, such deceptive excuses; they glaringly betray the very secrets they would conceal. We want no ghost to tell us—"*there is something rotten in the state of Denmark.*"

Aye, but they were willing to give "their respective testimonies" on commission—kind gentlemen! good gentlemen! we humbly thank them for this great condescension! But be assured, we are not to be played upon thus easily; we understand too well our own duty, and the interest of our client—we had a particular wish to be indulged with their gracious presence; we

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wanted to behold the light of their countenances; to read their very thoughts; to let you discover in their deportment, obvious proofs of the frankness and sincerity of their testimony; to compel not only the truth, but also the whole truth, by interrogatories grounded on their replies, and on circumstances which incidentally transpired. Less than the *whole truth* would have been a mockery of evidence, and would have destroyed, instead of vindicating our client; they will pardon us, therefore, for not entrusting our safety to their wonderfully accommodating expedient.

Gentlemen, I have done; no longer will I detain you from the duty you are prepared to discharge. Perhaps I should also apologize for having so long occupied your attention in so clear and obvious a case.

The indictment is unsupported—the accusation totally fails. By the very evidence produced by the public prosecutor, we have proved that Mr. Ogden's sale of arms was a mere affair of commerce, which infringed no existing statute. It has not been shown, that he was even acquainted with the plans of Miranda; you are of course bound to suppose, that he was ignorant of them. With equal propriety might a similar prosecution have been instituted against any individual, who innocently or ignorantly sold to Miranda a case of pistols, or a charge of gunpowder. On this ground alone, you cannot hesitate to pronounce a verdict of acquittal. We have also shown you, that the statute in question has not been violated, since the articles sold by Mr. Ogden did not proceed from hence to a Spanish colony, but to a French port in St. Domingo, to which it was both customary and lawful to make such shipments; that in fact the expedition of Miranda did not assume a hostile form at this port, but at St. Domingo, and proceeded from *thence* against the Caraccas. The fact also is known to you, that this country was not at peace with Spain, and on this head you have been referred to the official declarations of the president, as well as to acts of open hostility, committed by the Spanish forces. Though our testimony has been forcibly withheld from you, yet we have also, I trust, sufficiently satisfied your minds that the preparations of Miranda received the sanction of our executive magistrate; a sanction which, I presume, you will not question his right to grant—a sanction which cannot fail to exonerate the agents of his will from the pains and penalties of the law.

Gentlemen, you must be fully acquainted with this prosecution, and all its attendant circumstances; with the transaction referred to, in its real merits; and, above all, with your own powers, in their amplest extent. I call upon you to exercise them with candour and independence; I call upon you, as the watchmen of public justice, to protect its sacred sanctuary from

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becoming the den of oppression. With the light of the honourable verdict lately passed in this court, beaming on your path, your feet cannot stumble, nor your footsteps wander. You will yield another humiliating lesson to presuming power—you will afford another proof, that in this free and independent country, the arm of government may seek in vain to crush the humblest citizen. Though you can give no decision, that will indemnify my client for the wrongs and injuries he has already sustained, yet can your acquittal rescue him from those further penalties with which he is menaced. In your verdict, he will find some consolation for past severities; it will render his justification complete—his innocence triumphant.

Mr. EMMET.—I address you, gentlemen, with feelings far different from those with which I rose to address the jury that has recently acquitted colonel Smith. I had indeed the firmest reliance on their probity and good intentions; and the strongest hopes that they would not deliver the defendant over to punishment, without sufficient and satisfactory proof of his having offended against the law. Those hopes, however, were not unaccompanied with anxiety; the novelty of the case, its intrinsic importance, the vast interest which it has excited throughout the United States, and a fear that its decision might be influenced by party politics, all tended to excite my solicitude. Besides, this clause of the statute in question, had never before received a judicial interpretation; and I could not but feel considerable uneasiness, lest the ingenuity and talents of the counsel for the prosecution should mislead men, not very conversant in legal discussions, and not much habituated to detect and guard against the artifices of such able advocates. The conduct of that jury, however, has shown that my anxieties and fears were groundless. A sound and judicious interpretation has been given to the law by the acquittal of colonel Smith, and I trust you, gentlemen, will feel no disposition to question its correctness: no party politics have influenced their decision; for that jury, constituted of men of all political sentiments, has returned a verdict, which, in this great city, likewise composed of all the varieties of political sects, has been received with very universal satisfaction. The misfortune of the ballot has, it is true, gentlemen, deprived you of the honour of having broken the boom; but you may second and support their immortal verdict; your names will then be associated with theirs, and in the future history of these trials, you will be considered as their partners in independence and integrity.

If this were a common case, and that I had not been instructed by experience to guard against conclusions, which, though they do not, as I think, legitimately follow from the law or the evidence, may still be urged upon your consideration, I should

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confine myself to very narrow bounds; and should rest my client's defence, with a few general observations, upon some essential and obvious defects in the testimony produced on the part of the prosecution. But although I shall probably take somewhat of a more detailed view of the evidence, out of respect to the importance of this trial, do not suppose that I am actuated by any apprehension as to its ultimate result; for it would be unpardonable timidity indeed, to doubt of the defendant's acquittal, when there is no proof whatsoever which can attach to him the offence for which he is indicted.

A principle for which I contended in an early stage of this trial, would, if I had been fortunate enough to convince the court of the propriety of its application then, have swept away more than two-thirds of all the evidence we have heard. You will recollect, that at the outset of this multifarious testimony, I objected to any evidence's being received of the acts of third persons, not in the presence of Mr. Ogden, until proof should have been previously given of a connection as to design and object, amounting to combination or conspiracy, between those third persons and him. As this point had been previously argued, and the opinion of the court ascertained, I contented myself with simply stating and relying on the objection. Its propriety and force will, perhaps, be more strongly felt, now that the testimony is closed; for no proof has been given of a connection between the defendant and those third persons, but still a mass of irrelevant matter is let loose to operate upon your passions and your prejudices, if perchance any man among you should be capable of letting his verdict be influenced by prejudice or passion. The law has endeavoured to guard against this inconvenience, by a rule that is explicitly laid in 1 East's Crown Law, p. 96, which I submitted to the court, and shall take the liberty of again offering to your consideration. It is there stated, under the article High Treason, § 37, as follows: "In this, *as in other cases founded in conspiracy*, the conspiracy or agreement among several to act, in concert together for a particular end, must be established by proof, *before any evidence can be given of the acts of any person not in the presence of the prisoner*. And this must, generally speaking, be done by evidence of the party's own acts, *and cannot be collected from the acts of others, independent of his own*; as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts." The writer then proceeds with some observations upon what may be received as evidence of this connection, which are not relevant to the matter before us, and in the following section thus resumes the rule upon which I insist. "*But when the connection between the parties*, by one or other of the means above mentioned, *is once established*, of which the

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court must, in the first instance, judge, *previous to the admission of any consequential evidence to affect the prisoner by the acts of others, to which he was not a party or privy; then* whatever is done in pursuance of that conspiracy, by one of the conspirators, though unknown perhaps to the rest at the time, is to be considered as the act of all." On this question, permit me to observe, that the rule is laid down not only for high treason, but for all cases founded in conspiracy; that is, in the agreement of two or more persons to do an illegal thing. Permit me also to observe, that the broad and general rule of evidence is, no man shall be affected by the acts of others, to which it is not proved that he was party or privy. This rule is founded in reason and justice, and admits of no exception but the one, namely where those acts were done in pursuance of a previously formed agreement or conspiracy, between the accused and him whose acts are offered in evidence, to accomplish some illegal object. In order to open the door to this exception, it is necessary, as laid down by the authority just read to you, to offer preliminary proof of that agreement. In the present case then, my objection to the admission of this evidence, was founded not upon any technical rule relating to conspiracies, which you might think inapplicable here, but upon a broad and general principle of law, to which there is but one exception. It was with the opposite counsel to show, that the offence charged against Mr. Ogden fell within that exception, and was founded in conspiracy; and having done so, they should have given evidence of a conspiracy, and Mr. Ogden's being a party to it, before they were admitted to bring against him the acts of third persons in his absence.

But I was told, that if this evidence was not brought home to Mr. Ogden, the court would direct the jury to leave it out of their consideration. With deference, it appears to me, that the wisest way would have been to follow the course for which we contended, by withholding this testimony, till the preliminary fact of conspiracy was proved; and thus we should have avoided the trouble and delay, and exposure to unjust and injurious impressions on your part, which we have actually encountered. The admission, however, which that argument contains, will sufficiently instruct you in your present duties. There is not the smallest particle of evidence of any agreement or conspiracy between Mr. Ogden and the other persons who are mentioned by the witnesses; you must, therefore, lay out of your consideration every transaction done by another not in the presence of Mr. Ogden, and I expect this direction to you from the court.

Setting then aside all this irrelevant matter, what is the amount of the legal evidence in this case? That Mr. Ogden bought of general Stevens some arms, and of others some ammunition; that they were put on board the Leander, she being

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an armed vessel habitually trading to St. Domingo, to which place it was also lawful and customary to export military stores; that she had shipped on board 120 men; that 80 were the usual complement of her regular crew; but that the other 40 were destined for bringing back the Emperor and Indostan, belonging to the same owner, and then at St. Domingo, for which place she was bound; that Mr. Ogden went on board the Leander at the Hook in a sail boat, with a gentleman called general Miranda, who was going out in her a passenger to St. Domingo; that he then returned, and was afterwards arrested. Where is there the slightest crime in all these transactions? Let it not be said that I am sheltering my client under mere defects of testimony and legal evasions—No, on the contrary, let it be remembered, that he has never shrunk from any inquiry to which this trial might have given rise; let the circumstances under which he is forced upon his defence, be kept in mind; and then can I be blamed if I fasten on the deficiency of testimony for the prosecution, and call on the law for his acquittal.

Pursuant to the rule on which I have already insisted, that no notice is to be taken of the acts of others, not in the defendant's presence, you, gentlemen, will, I hope, lay out of the question, all that Miranda did, or Armstrong, or Lewis, or Loudon; all that was done about the printing press and Spanish types; but more particularly, all that was done by the persons on board the Leander after she left the Hook. You will consider the case, such as it is presented to you, by the facts that are legally proven and admissible as evidence. Mr. Ogden purchased arms and ammunition; he is in the habit of purchasing them as a merchant, and of sending them to St. Domingo; in doing so he committed no offence. There were 60 passengers taken on board; though Mr. Rose said there were 300 persons, it is now agreed there were but 180; of those 120 were regularly shipped; the others were considered as passengers. Is the owner of a ship to be acquainted with, or responsible for the objects of passengers?

I confess I feel very strongly inclined to rest my client's defence on this very palpable defect of testimony; and to commit it to you, gentlemen, with the few observations I have already made. Such, doubtless, would be my conduct on any other occasion. In this case, however, I am engaged by the degree of public interest which it has excited, and even by my personal respect for the counsel on the other side, to enter into a more detailed consideration of the charges and the evidence.

It is said that the expedition clearly appears to have been for a military purpose, from the circumstance that the preparations were coupled with concealment. The manifest, it seems, did not mention specifically the articles on board, and from thence

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it is inferred, that there was a criminal design of concealing the shipment from the knowledge of government. To all this reasoning I might content myself by relying on the principle which I have already endeavoured to impress upon your minds. The manifest was not the act of Mr. Ogden, nor made in his presence; there is no evidence that he was acquainted with its contents or imperfections—he cannot, therefore, be answerable for them; nor will they afford, as against him, any inference of intentional concealment. But I will go farther, and say, that the defects of that instrument have been attributed to dishonest motives, with which they could have no possible connexion. There could have been no intention of concealing from government that arms, ammunition, and military stores were putting on board; because one of the witnesses for the prosecution swears they were put on board under his inspection—he is a custom-house officer, and it was his duty to make his reports at the custom-house: further, the ship carpenter swears, that before the ballast was put on board, the wharf was so covered with military stores, that a person could scarcely pass. This is a proof that whatever may have been the reason why the manifest did not particularise all the articles of the shipment, it was not for the purpose of concealing them from government. Of what use could such concealment have been? Arms and warlike stores were openly sent to St. Domingo; it was not contrary to law to do so: there was no violation of the port-regulations; nor were there any additional duties to pay. Why then did not the manifest specify particulars? I will tell you what I believe to have been the reason. It is, I understand, not uncommon to adopt this conduct where the cargo contains contraband of war. We all know that the seas are infested with belligerent cruisers, from which it is scarcely possible that neutrals, with cargoes in the slightest degree suspicious, can ever escape; and if those cruisers were informed, that the cargoes contained articles contraband of war, they would be much more liable to capture. I perceive the opposite counsel ready to interrupt me, and set me right by reminding me, that the manifest is no part of the ship's papers, and that it remains here at the custom-house. True; but let him remember, that there are probably spies (at least commercial ones) here, and in every other considerable port. The custom-house must of necessity be open to them, and if the documents deposited there furnished information of contraband shipments, we can have no doubt but that they would greatly facilitate condemnations abroad. Manifests, therefore, I understand, frequently disguise the character of such articles; but whatever be the motive for their doing so, there can be no intention of cheating the government; for it can be defrauded of nothing by the evasion.

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Having, I hope, satisfied you on this point, let us see what gives to the last voyage of the Leander the character of a military expedition, which the other side is bound to attach to it by sufficient and positive evidence. Nothing that I recollect has been offered on that head but the testimony of Rose. What does it prove, and how does any thing that it proves apply to Mr. Ogden? Rose said there were about 40 passengers on board; does that furnish reasonable ground for inferring, that the vessel was proceeding on a military expedition? If so, I am afraid you must conclude, that my poor countrymen are intent on storming the principal cities of the Union; for there is scarcely a vessel from Ireland which does not bring two or three hundred passengers on board. I presume, however, that a number of persons taking their passage in the same ship, is no evidence of its being destined for a military expedition.

But the passengers on board the Leander called themselves captains, colonels, and majors; if so, where were the soldiers? And are officers alone sufficient for carrying on a military expedition? Here also the question recurs, of which you should never lose sight, what does Mr. Ogden know of those commissions or titles? Were they given or used in his presence? How do any acts or titles of gen. Miranda, or his officers, bring home a crime to the defendant? It is stated that the Leander went against the Spanish Main; is it proved that he authorised its doing so? He appears to have been a total stranger to the motives that influenced captain Lewis to take this step; perhaps the captain did not find a ready market at St. Domingo, and therefore proceeded further; perhaps Miranda purchased the whole cargo, on condition of his landing it on the Main. To convict the defendant by this kind of testimony, it should be proved that he was in a conspiracy with general Miranda to revolutionize the Caraccas. They are unable to give evidence of any fact of that kind; and need I suggest to you, gentlemen, that no out-of-door rumours, no surmises on your parts, nor any impressions or belief which you may have formed, can, in this case, supply the want of that necessary evidence? This is a criminal proceeding; the public prosecutor is bound to make out his case; surmises and hypothetical suppositions are open to us, but not to him; and if he cannot furnish you with the necessary proof for establishing the accusation, he must fail of convicting the defendant. No testimony of a conspiracy between the defendant and general Miranda has been laid before you; it cannot therefore be presumed on this trial; and, of course, you are not warranted to take any notice of the general's conduct, after he left this port, with the view of applying it to Mr. Ogden.

It is, however, too strong a conclusion for you to draw in a criminal case, that because the Leander was armed, and carrying out military stores to the Spanish Main, she was therefore

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bound on a military expedition. It is perfectly known to you, that all the coasts of South America, owned by Spain, are well watched by guarda costas; now what evidence have you that this was not a smuggling instead of a military expedition? Rose indeed has said something about a fort, and about some expressions of Miranda and his companions; but I ask again, what relation can their expressions have to Mr. Ogden, or wherefore should he be affected by them?

The counsel for the prosecution also urge in further proof that this expedition was military, the other articles which were procured for it; and I remember, that on the last trial, great stress was laid upon the circumstance of a considerable quantity of clothing being put on board, which it was alleged was not an ordinary article of trade. That presumption, however, is now entirely removed; for you have ample evidence that clothing has been exported from hence in great quantities, for the purposes of commerce. But even supposing the clothing in question was not intended as an article of trade, how will that affect the defendant? Those persons they call the officers purchased some uniforms, and a number of jackets and trowsers were procured from the tailors. Was this done by Mr. Ogden, or in his presence? Yes, it seems that on one occasion he walked with Mr. Armstrong into a store, and waited for him there while he was giving some orders; but this does not prove privity between them. Would you think it fair and reasonable, that any of you should be implicated in a crime from the circumstance of walking with an acquaintance, and accompanying him into a store; without having taken any part in his transactions there? If this doctrine be true, any man may, under similar circumstances, be involved in the punishment of offences, of which he never had any knowledge. Is it possible, after sifting and riddling the whole of this testimony respecting the military nature of the expedition, that you can find in it a particle of sufficient substance to affect the defendant? What he appears to have done in the course of his business as a merchant, if it was lawful, will be considered as lawfully done. He sent arms and ammunition to St. Domingo; he was in the habit of doing so commercially, and it was legal; you have all of you frequently heard of "Ogden's fleets." But it is said that in this instance he practised a deception, which is evidence of his being privy to general Miranda's designs; in the bond which he executed at the custom-house for the return of the arms on board the Leander, he said nothing of the great quantity she contained, but only specified, I think, 17 guns. The gentlemen in arguing thus, mistake the nature of that bond; it has reference only to the arms used in the equipment of a vessel, but no relation whatsoever to its cargo, which it would be absurd to suppose any man on exporting was to give bond for bringing back again. The

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equipment Mr. Ogden very faithfully described, and therefore he is innocent of the deception imputed to him.

Let us now advert to the allegation in the indictment, that he *began* and *set on foot* this expedition. On this point I shall content myself with referring to your memories, without a single observation from me, whether any thing that has been said can possibly prove it? As to *providing and preparing the means*, &c. the learned counsel who closed the defence of colonel Smith, suggested, on that occasion, a construction of this clause of the statute, which I shall beg leave to press upon your attention. That you may the better understand it, permit me to read you part of the 4th section of the act of the 5th of June, 1794, and to mark the distinction between it and the 5th section of the same act, upon which the defendant is indicted. The 4th section runs thus: "If any person shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, *or shall be knowingly concerned* in increasing or augmenting the force of any ship of war," &c. Observe those words—*or shall be knowingly concerned* in doing the prohibited thing. The 5th section has no such words; but only enacts, that whoever shall provide or prepare the means for any military expedition, &c. shall be punished. Those words, "or shall be knowingly concerned," were inserted in the 4th section, to punish those who partially assisted in augmenting the force of such vessel, and clearly shew the opinion of the legislature, that those who only gave such partial assistance, could not be comprehended in the words "increase or augment, or procure to be increased or augmented;" so in the fifth section, which is before you, those who have only partially assisted or *been concerned* in providing or preparing the means for a military expedition, cannot be comprehended in the description of persons who have provided or prepared the means; for *the means*, in the strict construction of a penal statute, must be understood as *the whole means*; and no person who has provided only *part of the means*, can be punished under the clause of the act. The district attorney has said, that the principal means for a military expedition, are the men: the men were provided by another person; and as he has not shown a conspiracy or combination among the parties, the acts of that other person can in no shape affect Mr. Ogden. It is said, however, that he paid some of those men; that is not the fact. Miranda drew on him for the money, and he honoured the drafts. This was the mere act of a merchant, for which he was entitled to commission; it was an act that any other merchant in the city might have performed, and it would not be alleged that, by so doing, he had rendered himself guilty, under this statute, of providing the means for a military expedition.

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The next question that presents itself is, what was the destination of the Leander? The only destination with which it is proved that the defendant was acquainted, was St. Domingo, and that does not fall within this statute or indictment. If, after the vessel's arrival there, she went further, is there any evidence that this was done with his knowledge? And permit me to remind you, that you have no right to presume any thing unfavourable to him, in order to eke out a criminal prosecution. But it is said the Leander went from St. Domingo to Aruba, and from that to Porto Cavallo, and that she was carrying on a military expedition against the Caraccas; if so, the expedition was carried on from St. Domingo, where the whole assumed a military shape, or from Aruba, and not from New York. But to make the case fall within the indictment, it must be a military enterprise carried on (as such) from some part of the United States. Now, as to the assertion that this was an expedition *against* the Caraccas, see what is the evidence: forty men and a printing press, sent in hostility to a formidable province! would they be weak enough to set themselves in opposition to a million? No, on the first blush of the affair, you must be convinced, that if general Miranda and his friends had any military views, they must have been *for* the Caraccas, and not *against* them; in aid and favour of the people, and not with any purposes of hostility against the inhabitants of that strong and populous country. This part of the indictment, therefore, is equally unproved.

We come now to the averment, that the United States were then at peace with Spain. Though this topic is exhausted, permit me to remind you, that penal statutes must be strictly construed; that the terms of peace and war have each two significations somewhat different; one technical, and the other more loose and familiar. If the loose and familiar signification would be favourable to the defendant, you are bound in the construction of this penal law to adopt it, and more particularly, if you find that on other occasions the legislature has employed the word *peace* in that popular acceptation, and not as the opposite to war, declared by congress, according to the forms of the constitution. That the legislature has done so, you can have no doubt, if you examine the statute respecting the armament against the Algerines, 3d vol. of the Laws of the United States, pages 22 and 25. In that statute, the depredations of the Algerines against our commerce are mentioned, but no war declared—nor in truth had congress exercised its constitutional right of doing so: and yet the last section says, that *if a peace shall take place* between the United States and the regency of Algiers, no further proceedings shall be had under that act. Here the legislature has described the country as not being in a state of peace, although no war had been declared, and nothing had happened to destroy the state

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of peace, but depredations on our commence. All I ask of you, then, gentlemen, is, that in the construction of the penal law before you, you will take the congress for your guide, and interpret the word peace in the same sense as you find it employed by the very legislature that enacted this law and almost at the very same time. That body has declared, that peace between us and any foreign nation, is destroyed by its depredations and aggressions. This construction is particularly appropriate to the law upon which you have to decide; because it is an act that confers peculiar protection upon the nations which it favours, and there is no reason why any foreign state should enjoy the benefit of peculiar protection, without meriting it by peculiar amity. The countries against which war has not been declared, according to the forms of the constitution, but which provoke it by their hostile aggressions, may stand upon the law of nations, and claim whatever benefit it gave anterior to and independent of this law, or gives at this day in England, where no such law has ever existed.

Now let me ask you, did Spain stand in the situation with respect to us, at the time of this expedition, that she merited, by her peculiar amity, the peculiar protection of that statute? Had she not (as the Algerines had in 1794, according to the declaration of the Legislature itself) destroyed the state of peace between her and us by her hostile depredations and aggressions? When the Leander was fitting out here, were we not in that state, that the president was obliged to send a message to congress on the subject, in which he unequivocally denominates the acts of Spain towards us, as acts of hostility? But it has been said, that if Spain was at war with us then, she is at war with us now: that question is very immaterial for me to discuss; I may, however, answer the observation, by pointing out this difference. At the time of the armament, as it is called, congress had not passed any resolution on the subject of our relations with that country; but they have since determined to negotiate.

I have now, gentlemen, offered some observations upon the evidence; and in doing so, I have acted rather contrary to my judgment; for to me it appears conclusively, that no part of the testimony, such as it is, can in any manner touch Mr. Ogden. He only hired his ship, and sold articles of commerce as a merchant. It may, perhaps, be supposed, that he had some knowledge of the object of the expedition; so probably had Mr. Haight, who made the belts and pouches, and military accoutrements; but is it pretended, that the latter gentleman should be thereby prevented from selling them, or the former from following his mercantile pursuits?

It is settled by the concurrence of all parties, that you, gentlemen, are the judges of law and fact. You will no doubt

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discharge this important duty with due deference to the court; but you are also bound to the discreet exercise of your own judgments. The learned judge will declare what he conceives the law to be; but as the verdict, comprising in it both law and fact, will be exclusively yours, your oaths require you to consider and determine for yourselves. If you find any of the points that I have argued to be in favour of the defendant, it will entitle you to deliver a general verdict of acquittal; and in doing so, your decision cannot be more gratifying to your own feelings, than it will be consistent with what I conceive to be the justice of the case.

[Mr. EDWARDS's speech omitted.]

Judge TALMADGE then proceeded to charge the jury. The points of law that arose in the progress of this trial, being precisely the same as those raised and determined on the trial of col. Smith, the judge's charge was the same in substance, as reported in that trial; and after a careful collation of the testimony, which his honour told the jury was, in his mind, clear and decisive against Mr. Ogden, as having provided and prepared the means within the United States of a military expedition, to be carried on from thence against the dominions of some foreign power, he closed his charge by observing, that the defendant's agency in preparing the means, the nature of the expedition, and its destiny, were facts of which the jury were the proper and only judges. That whether the United States, at the time the offence is charged, were at peace or in war, is matter of law, and as such ought to be decided by the court. The jury might conscientiously rely upon its correctness, and were under no necessity to assume a responsibility beyond a determination of matters properly within their decision.

The jury retired, and, after a short absence, returned a verdict of NOT GUILTY.

THE END.

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